Supreme Court, U.S.
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No. 02- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress by statute waive the government's immunity from the more than $700 million in interest owed to more than 7500 exporters on refunds of the Harbor Maintenance Tax, which this Court previously held in this case violates the Constitution's Export Clause?

2. Is such a waiver unnecessary either because the government is required to pay interest under the Export Clause or because it is at least required to return the more than $70 million in profits it actually earned by investing the HMT payments, as this Court held in *Henkels* v. *Sutherland*, 271 U.S. 298 (1926)?

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

RULE 29.6 STATEMENT

Petitioner United States Shoe Corp. is a wholly owned subsidiary of Luxottica U.S. Holding Corp., which in turn is a wholly owned subsidiary of Luxottica Group S.p.A., Italy, a publicly held corporation. On May 23, 1995, the assets of the Footwear Division of United States Shoe Corp. were acquired by Nine West Corporation, a publicly held corporation that was subsequently acquired by Jones Apparel Group, Inc., a publicly held corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United States Shoe Corp. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit (Pet. App. 1a-12a) is published at 296 F.3d 1378. The opinion of the U.S. Court of International Trade (Pet. App. 13a-19a) is published at 20 C.I.T. 206.

JURISDICTION

The U.S. Court of Appeals for the Federal Circuit denied a timely petition for rehearing *en banc* (Pet. App. 114a-15a) on October 22, 2002. The Chief Justice previously extended the time to file this petition to and including February 19, 2003. This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix (at 130a-43a).

STATEMENT OF THE CASE

This petition presents the unfinished business of this Court's prior, unanimous ruling in this case that the Harbor Maintenance Tax (HMT) violates the Constitution's Export Clause. *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) [hereinafter *U.S. Shoe I*] (Pet. App. 102a-10a); U.S. CONST. art. I, § 9, cl. 5. The Court of International Trade on remand ordered the United States to refund the HMT payments together with interest. That interest represents the considerable lost time-value of the money that the government first unconstitutionally exacted and later continued to hold. But, in an opinion that fails to follow either the

letter or the spirit of this Court's prior ruling, the Federal Circuit reversed the award of interest.

The questions presented are important because this case controls approximately 7500 claims pending administratively or in the lower courts. The vast number of cases spans the many years since the HMT was enacted in 1986, during which the government has fought tooth and nail to delay – and continues to this day to delay – refunding even the principal. The resultant amount of interest owing to exporters that is at stake in this case is at least $700 million, and growing. The government itself has earned at least a $70 million profit by investing the money that it unconstitutionally exacted from exporters. Further, exclusive jurisdiction lies in the Court of International Trade and subsequently the Federal Circuit, so exporters have no other forum in which they can pursue their claims to interest.

This Court should accordingly grant certiorari to decide two questions:

First, did Congress waive the government's immunity from interest on HMT refunds? Petitioners urge that the answer is "yes." Congress comprehensively waived the government's immunity from interest in numerous statutes governing refunds of both customs duties and taxes. One statute, in particular, is plain. Congress provided that the HMT shall be treated as "a customs duty" (26 U.S.C. 4462(f)(1)), a fact that played a central role in this Court's prior ruling that the CIT has jurisdiction over the case (Pet. App. 105a-06a). Congress specified, in turn, that refunds of customs duties shall be paid "together with interest thereon." 19 U.S.C. 1505(b). Even the government should concede that Section 1505 applies here, for that is the authority upon which it relies in *refunding the principal*. Further, the government previously acknowledged that it "is *required* to apply the rules and principles of section [1505]" to the HMT because "section [1505] is one of the customs laws which by Congressional mandate applies" to the HMT. Pet. App. 141a (emphasis

added). The Federal Circuit's holding that interest is nonetheless not available thus does not accord with the statutory text, this Court's prior decision in this case, or the government's own practice.

Even if a convoluted course of statutory arguments could be employed to conclude that Congress did not waive the government's immunity from interest and thus inadvertently permitted the manifestly unjust outcome reached below, certiorari is warranted to decide a second question: is the "no-interest" presumption applicable here? The court of appeals' holding that the remedy for violations of the Export Clause does not include an award of interest – such that the government may effectively demand of exporters an interest-free loan – runs directly contrary to the constitutional design, which (as the Court previously held in this very case) sought to prevent any burden on exports by "denying to Congress the power to tax exports *at all*." Pet. App. 108a (emphasis added). Here, the government claims the right to deprive exporters of the lost time-value of the unlawfully exacted money to the tune of more than $700 million. At the very least, the Export Clause requires the government to disgorge the *actual proceeds* it earned on the unconstitutional exaction, for the framers intended that "exports should *not* be made a source of revenue to the National Government" (*Fairbank* v. *United States*, 181 U.S. 283, 292-93 (1901) (emphasis added)).

Indeed, the no-interest presumption is simply inapplicable where (as here) the government has actually realized profits from its investment of unlawful exactions. Such a case involves what Justice Kennedy has termed "accrued interest" – *viz.*, proceeds that the government itself has actually reaped from exactions that were invalid *ab initio*. *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 540 (1998) (concurring opinion). The Federal Circuit's decision cannot be reconciled with this Court's express holdings that the government must disgorge the proceeds it earns on unlawfully exacted funds,

and that the no-interest presumption is inapplicable in that circumstance. *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). Two courts of appeals (disagreeing with four other circuits) have reached the same conclusion and would award the proceeds to exporters.

In addition to the Export Clause, two other constitutional provisions – the Takings and Due Process Clauses – require the government to disgorge its profits in this case, both on the ground that the framers could not have intended to permit the government to adopt an unconstitutional tax, only to keep proceeds earned on the principal over many years while the unlawfulness of the exaction is determined. Even if the government's retention of those discrete, identifiable, and identified proceeds did not amount to a "taking" of the claimants' property within the meaning of the Fifth Amendment, surely the government's retention of those funds cannot be dignified as a deprivation of that property with "due process of law."

At the very least, the Federal Circuit's construction of the governing statutes not to support an award of interest should be rejected because it raises serious constitutional questions under the Export, Takings, and Due Process Clauses.

The petition for a writ of certiorari should accordingly be granted.

1. Congress enacted the Harbor Maintenance Tax (HMT) in 1986. 26 U.S.C. 4461-4462. The HMT charged shippers, including exporters, a percentage of the value of the cargo they shipped through the nation's ports. *Id.* § 4461(b), (c)(1)(B). Congress directed that funds collected under the HMT be held in a separate "Harbor Maintenance Trust Fund." 26 U.S.C. 9505. The statute furthermore required that the HMT funds be invested "in interest-bearing obligations of the United States" and that revenues therefrom "be credited to and form part of the Trust Fund." *Id.* § 9602(b)(1), (b)(3). The interest was reported separately to Congress.

Congress did not adopt a wholly new statutory scheme for the collection, expenditure, and refund of funds paid under the HMT. Nor did it enact a raft of amendments to the many provisions of the U.S. Code governing existing customs duties. Rather, it took a shortcut, directing that the already-existing customs statutes would govern the HMT through the "[e]xtension of provisions of law applicable to customs dut[ies]." 26 U.S.C. 4462(f) (title). Specifically, "*all* administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] * * * as if such tax were a customs duty." *Id.* § 4462(f)(1) (emphasis added). Further, "[f]or purposes of determining the jurisdiction of any court of the United States * * *, the [HMT] shall be treated as if such tax were a customs duty." *Id.* § 4462(f)(2).

The HMT applied to tens of thousands of exporters, including petitioner U.S. Shoe Corp. Petitioner paid the tax but sued the United States in the Court of International Trade (CIT) on the ground that the HMT violated the Constitution's Export Clause. The Export Clause provides: "No Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

A special three-judge panel of the CIT unanimously agreed that the HMT violated the Export Clause and ordered the United States to refund to exporters the tax they had paid. Pet. App. 20a-57a. On the government's appeal, a special five-judge panel of the Federal Circuit concluded that the CIT had jurisdiction under 28 U.S.C. 1581(i) and affirmed on the merits. Pet. App. 62a-88a. Only Chief Judge Mayer dissented. *Id.* 89a-101a.

2. The Solicitor General's petition for certiorari from the Federal Circuit's decision asserted that review was essential because "several thousand cases pending in the Court of International Trade and the Court of Federal Claims raise the same question presented in this case" and the funds at stake "exceed several hundred million dollars." No. 97-372, Pet.

for Cert. 25. "In similar contexts," the government explained, "this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance," particularly when (as in this case) there is no realistic prospect that "any other court of appeals will have an opportunity to review the issue." *Id.* See also *id.* at 12.

This Court granted certiorari (522 U.S. 944 (1997)) and unanimously affirmed (Pet. App. 102a-10a). Preliminarily, the Court agreed that jurisdiction was proper in the CIT under 28 U.S.C. 1581(i). That statute provides in relevant part: "[T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * revenue from imports" or relating to other duties or restrictions on "the importation of merchandise." *Id.* § 1581(i)(1)-(3). This Court rejected the argument that Section 1581(i) does not apply to a duty on *exports*. The Court found the fact that the statute nominally applied only to "imports" both "hardly surprising in view of the Export Clause, which confines customs duties to imports," and also *irrelevant* because "'Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction.'" Pet. App. 106a (alterations in original) (quoting CIT's decision, Pet. App. 46a).

On the merits, this Court affirmed the Federal Circuit's holding that the HMT was unconstitutional as applied to exports. The text and purposes of the Export Clause, the Court explained, categorically prohibit any tax on exports. "[T]he Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." Pet. App. 108a. The framers, having determined that "exports should not be made a source of revenue to the National Government" and furthermore "that the National Government should put nothing in the way of burden upon such exports" (*Fairbank* v. *United States*, 181 U.S. 283, 292-93 (1901)), "*completely*

den[ied] to Congress the power to tax exports *at all*" (Pet. App. 108a (quoting *United States* v. *IBM Corp.*, 517 U.S. 843, 861 (1996)) (alterations omitted) (emphasis added)).

3. On remand, the CIT reinstated its order that the government refund the HMT. Pet. App. 111a-13a.[1] By that time, exporters had been assessed approximately $1.4 billion. The statutory interest owing to exporters totals at least $700 million. The CIT directed that the refunds include interest. *Id.* 112a-13a.

On the government's appeal, the Federal Circuit reversed. Pet. App. 1a-12a (per Mayer, C.J.). The court of appeals first rejected U.S. Shoe's arguments that Congress had waived the government's immunity from interest by statute. See Pet. App. 4a-6a (applying its ruling in a parallel suit by IBM, *reproduced infra* at Pet. App. 116a-29a[2]). Although the court of appeals acknowledged the provisions of the customs and tax laws broadly waiving the federal government's immunity from interest, it concluded that a refund of the HMT did not fall within any of those statutes.

The Federal Circuit thus held that interest was not available under 19 U.S.C. 1505, which provides in relevant part:

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[1] The Federal Circuit also approved an administrative refund mechanism for exporters in *Swisher International, Inc.* v. *United States*, 205 F.3d 1358, *cert. denied*, 531 U.S. 1036 (2000). This case will determine whether exporters receiving these "*Swisher* refunds" will receive interest from the date they made their HMT payments.

[2] The Federal Circuit in *IBM* rejected an exporter's claim that it had a statutory right to interest. The exporter then sought review in this Court, but only on constitutional grounds that the Federal Circuit had not addressed. See U.S. BIO, No. 00-482, at 5 ("[T]he asserted constitutional issues that petitioner now seeks to raise were not raised in the court of appeals and are thus not properly presented in this case."). This Court not surprisingly denied certiorari. 531 U.S. 1183 (2001).

> 19 U.S.C. 1505(b). [R]efund of duties * * * and interest due upon liquidation or reliquidation. The Customs Service shall * * * refund any excess monies deposited, together with interest thereon, as determined on a liquidation or reliquidation.
>
> 19 U.S.C. 1505(c). Interest. Interest on excess moneys deposited shall accrue * * * from the date the importer of record deposits estimated duties, fees, and interest * * * to the date of liquidation or reliquidation of the applicable entry or reconciliation.

The court of appeals acknowledged Congress's direction that "*all* administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] * * * *as if such tax were a customs duty*." 26 U.S.C. 4462 (f)(1) (emphases added). Nor was there any dispute that Section 1505 *is* an "administrative and enforcement provision of the customs laws." Pet. App. 5a-6a. Yet the court of appeals nonetheless held that Section 1505 was inapplicable on the ground that it "contemplates an entirely different factual scenario from the one before us" because the terms "importer of record," "liquidation," and "entry" do not apply to the taxation of exports. *Id.* 128a.

The Federal Circuit also held that interest was not available under 28 U.S.C. 2411, which provides: "In any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed * * *." See Pet. App. 5a. The court of appeals found it determinative that Congress had provided that "[t]he tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." 26 U.S.C. 4462(f)(3). According to the Federal Circuit, every provision of law relating to tax reimbursements – including any provision requiring the government to pay interest on court-ordered reimbursements – necessarily "re-

late[s] to the administration and enforcement of internal revenue taxes." Pet. App. 122a-27a.

The Federal Circuit also rejected U.S. Shoe's argument that an express waiver of the government's immunity was unnecessary because it was not seeking "interest." U.S. Shoe relied on the Sixth and Ninth Circuits' holdings that a court order requiring the government to disgorge the proceeds it earned on unlawfully forfeited money does not implicate the government's immunity from "interest." *United States* v. *$515,060.42*, 152 F.3d 491, 504-06 (CA6 1998); *United States* v. *$277,000*, 69 F.3d 1491 (CA9 1995). The government acknowledged that "the courts are split" over this question. U.S. C.A. Br. 46. The Federal Circuit, however, held that an express waiver of immunity is required even in this circumstance. Pet. App. 11a-12a.

The Federal Circuit separately rejected petitioner's argument that the Export Clause itself conferred either a right to the $700 million in lost time-value of the money or an entitlement to the more than $70 million in proceeds the government had actually earned on the unconstitutional HMT payments.[3] The court of appeals found it dispositive that the Takings Clause, which confers a right to interest, has a "restorative clause" that is absent from the Export Clause: private property shall not "be taken for public use without just compensation." Pet. App. 9a-11a.

Nor, the court of appeals held, did the Constitution otherwise require the government to disgorge the proceeds. There was no Fifth Amendment Taking or violation of the Due Process Clause, the court ruled, because "[t]he tax revenue here was not held by the government as property of U.S. Shoe. It became the property of the Treasury upon payment,

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[3] The $70 million figure is the most conservative estimate of the government's profits. Other estimates, which better account for the government's investment and spending of monies in the Trust Fund, place the figure in the hundreds of millions of dollars.

and was appropriated to the Harbor Maintenance Trust Fund along with" HMT payments by parties other than exporters. Pet. App. 8a. Moreover, according to the opinion below, the government's retention of proceeds on the unconstitutional tax was constitutional because the HMT itself "served the rational purpose of maintaining the ports": "'Congress mandated that fees collected from the HMT be used only for commercial navigation projects.'" *Id.* 9a (quoting Mayer, C.J., dissenting from Federal Circuit's holding in *U.S. Shoe I* that HMT violated the Export Clause).

4. The Federal Circuit denied rehearing *en banc* (Pet. App. 114a-115a) and this petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

This Court previously held in this case that the HMT violates the Export Clause of the Constitution. Certiorari should be granted because, although the government has begun refunding the principal, this case controls the disposition of thousands of other challenges to the government's failure to pay interest. At least $700 million is at stake. The government's own petition successfully urging this Court to grant plenary review in *U.S. Shoe I* emphasized the Court's practice of reviewing decisions of the Federal Circuit that are of such significant fiscal importance.

Review is furthermore warranted because the Federal Circuit's decision cannot be reconciled with the statutory text, the clear import of this Court's prior decision, or the government's own practice. Congress has broadly waived the government's immunity from interest under the customs and tax laws. Most obviously, Congress specified that the HMT shall be treated as a customs duty – a provision central to this Court's jurisdictional ruling in this case (Pet. App. 105a-06a) – and provided that refunds of customs duties shall include interest. 26 U.S.C. 4462(f); 19 U.S.C. 1505. The government has elsewhere conceded, both explicitly and by implication, that Section 1505 requires it to pay interest.

Finally, review is warranted to determine whether an express waiver of the government's immunity from interest is required at all. This Court has squarely held that no waiver is required when disgorgement of profits is in question. *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). Nonetheless, substantial disagreement remains on the issue, as shown by the four-to-two circuit conflict in the related context of the government's refund of monies that it has unlawfully forfeited. Further, precedents applying three constitutional provisions – the Export, Takings, and Due Process Clauses – establish that when the government unconstitutionally exacts monies, it must return not just the principal but also any proceeds that it actually earned during the period that it unlawfully held the principal. Indeed, the Export Clause is properly construed to confer a right to interest whether or not the government has earned any proceeds. These serious constitutional questions, of course, can and should be avoided by recognizing that Congress *has* waived the government's immunity from interest in this case.

I. Certiorari Should Be Granted In Light Of The Importance Of The Federal Circuit's Decision.

Congress enacted the Harbor Maintenance Tax in 1986, specifying that HMT assessments be deposited in a discrete trust fund where they would, in turn, be invested in interest-bearing securities. 26 U.S.C. 9505, 9602(b). Pursuant to the statute, many tens of thousands of exporters paid approximately $1.4 billion in taxes on their exports. The lost time-value of the exporters' money has reached more than $700 million. The government itself has earned on the principal, and deposited into the Trust Fund, at least $70 million.

Although thousands of exporters have still not received full refunds of the principal, at least that process began when this Court in 1998 unanimously invalidated the HMT as a violation of the Export Clause. Pet. App. 102a-10a. The government nonetheless insists that it has no obligation to provide exporters either statutory interest or the massive pro-

ceeds that it earned and continues to earn on the principal that it unlawfully exacted. The Federal Circuit approved that extraordinary result.

This case controls the approximately 7500 other claims that have been brought against the government, and thus controls the disposition of the more than $700 million in interest that is rightfully owed to the exporters. All the claims lie within the exclusive jurisdiction of the Federal Circuit. If the Court denies this petition for certiorari – together with the expected follow-on petitions of other exporters – it will effectively close the door on the rights of thousands of litigants.

The Court's practice in these circumstances has been to grant certiorari. The Solicitor General successfully made that point earlier in this very case, and the government's inevitable assertion that review is now not warranted will ring hollow with the sound of self-interest. Here as in *U.S. Shoe I* "[t]housands of cases" involving sums that "exceed several hundred million dollars" are at stake. No. 97-372, Pet. for Cert. 25. Jurisdiction on each claim "will lie exclusively [in] the Federal Circuit." *Id.* (citing 28 U.S.C. 1295(a)(3), (5)). In such a circumstance, the Solicitor General explained, "this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance." *Id.*[4]

Certiorari is warranted in this case in particular because, as petitioner now shows, the decision below cannot be recon-

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[4] The government cited: *United States* v. *Hill*, 506 U.S. 546 (1993) (interpreting 26 U.S.C. 56, 57(a)(8), which requires payment of a "minimum tax" on items above the "adjusted basis" of deposit interests); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989) (holding that "accumulated profits" in the indirect tax provision statute – 29 U.S.C. 902 – are to be measured by U.S., not foreign, principles of taxation); and *United States* v. *American Bar Endowment*, 477 U.S. 105 (1986) (interpreting the words "unrelated business income" in 26 U.S.C. 511-513, which subjects such income to taxation).

ciled with the statutory text, this Court's precedents, or the government's own practice.

II. Certiorari Should Be Granted Because The Federal Circuit Failed To Give Effect To Congress's Intent To Waive The Government's Immunity From Interest.

The Federal Circuit's decision in this case concludes that Congress failed to waive the government's immunity from interest in issuing refunds of the HMT. Yet the government was unable to offer, and the court of appeals failed to articulate, any *reason* for Congress to have adopted so strange a course – strange, given that it has so conspicuously, categorically, and comprehensively waived the government's immunity from interest with respect to both taxes and customs duties. Congress has conferred a broad right to interest on repayments by the Internal Revenue Service and the Customs Service, as well as on payments that the courts order either of those entities to make. See 19 U.S.C. 1505(b) ("The Customs Service shall * * * refund any excess moneys deposited, together with interest thereon."); 26 U.S.C. 6611(a) ("Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax * * *."); 28 U.S.C. 2411 ("In any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed * * *."); *id.* § 2644 ("If, in a civil action in the Court of International Trade under [the administrative protest provision of the customs laws], the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed * * *."). To read the governing statutes as the government and the Federal Circuit would have this Court read them – *i.e.*, as reflecting an implicit intent to withdraw these broad waivers of immunity for this one important category of cases – is to attribute to Congress nothing short of utter caprice.

1. Congress most obviously conferred on exporters a right to interest on a refund of the HMT in 19 U.S.C. 1505. That statute provides in relevant part:

> 19 U.S.C. 1505(b). [R]efund of duties * * * and interest due upon liquidation or reliquidation. The Customs Service shall * * * refund any excess monies deposited, together with interest thereon, as determined on a liquidation or reliquidation.
>
> 19 U.S.C. 1505(c). Interest. Interest on excess moneys deposited shall accrue * * * from the date the importer of record deposits estimated duties, fees, and interest * * * to the date of liquidation or reliquidation of the applicable entry or reconciliation.

The Federal Circuit held that Section 1505 is inapplicable because it "contemplates an entirely different factual scenario from the one before us" in that the terms "importer of record," "liquidation," and "entry" do not apply to the taxation of exports pursuant to the HMT. Pet. App. 128a. The Federal Circuit's construction lacks merit.

a. If Section 1505 did not apply to the HMT on exports, then the government would lack any statutory mechanism prescribing the manner in which it should *refund the principal*, whether in the event of an administrative overassessment, an inadvertent overpayment, or (as here) an unconstitutional tax. That cannot be so. Section 1505(b) thus provides statutory authority for a refund, together with interest, in one breath; both stand or fall together: "The Customs Service shall * * * refund any excess monies deposited, together with interest thereon, as determined on a liquidation or reliquidation."

Even the government concedes that Congress could not have intended such a result. The Customs Service thus adopted regulations providing for refunds. See 19 C.F.R. 24.24(e)(4) (2000 and 2001). The proposed regulations all relied in pertinent part on *Section 1505*. 67 Fed. Reg. 31,948 (May 13, 2002); 66 Fed. Reg. 16,854 (Mar. 28, 2001); 66 Fed. Reg. 21,086 (Apr. 27, 2001); 66 Fed. Reg. 34,813 (July 2, 2001). This concession that Section 1505 authorizes re-

funds of the HMT to exporters necessarily carries the further concession that interest is available as well, for (as noted) the latter follows automatically from the former according to the plain text of the statute.[5]

b. The Federal Circuit's construction is furthermore unsupportable because it flouts Congress's design of the HMT in general and 26 U.S.C. 4462(f) in particular. Rather than enacting a broad new regulatory scheme or amending all of the customs laws to account for the HMT, Congress provided that the tax would be collected, disbursed, and refunded through "[e]xtension of provisions of law applicable to customs dut[ies]." 26 U.S.C. 4462(f) (title). In particular: "*all* administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] * * * *as if such tax were a customs duty*." *Id.* § 4462(f)(1) (emphases added).

There is no dispute that Section 1505 is an "administrative and enforcement provision of the customs laws." Section 1505, entitled "Payment of duties and fees," is codified in Chapter 4 of Title 19, which sets forth the "[a]dministrative [p]rovisions" (title) of the customs laws. Yet the court of appeals inexplicably failed to follow Congress's direction to apply Section 1505 "as if [the HMT] were a customs duty." If it

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[5] The first three Federal Register notices cited only Section 1505. The final version included an unexplained further citation to 19 U.S.C. 1520, but that statute does not support the Federal Circuit's decision. Because Congress directed that the HMT be treated as a customs duty, a refund could be available under Section 1520 only if "it is ascertained *on liquidation or reliquidation of an entry or reconciliation* that more money has been deposited or paid as duties than was required by law to be so deposited or paid." *Id.* § 1520(a)(1) (emphasis added). Thus, to the extent the government relies on Section 1520 as authority for issuing refunds, it must concede that the provisions of the customs laws apply to the HMT notwithstanding that they contemplate "liquidation or reliquidation" and the existence of "an entry or reconciliation."

had heeded that command, the court of appeals would have found that exporters have a right to interest. The terms that the Federal Circuit found critical in Section 1505 – "importer," "liquidation," "entry," and "reconciliation" – appear throughout the administration and enforcement provisions of the customs laws and regulations because they govern the payment *of customs duties*. See 19 U.S.C. 1500; 19 C.F.R. 19.12 (providing for reconciliations); *id.* § 141.0a(a) (defining entry); *id.* § 159.1 (defining liquidation).

That is precisely the reasoning underlying this Court's jurisdictional holding in *U.S. Shoe I*. This Court in *U.S. Shoe I* affirmed the Federal Circuit's determination that jurisdiction is proper under 28 U.S.C. 1581(i), which grants the CIT "exclusive jurisdiction of any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * revenue from imports" or other duties or restrictions on "the importation of merchandise." *Id.* § 1581(i)(1)-(3). In reaching that conclusion, this Court found that Section 4462(f)(2) made Section 1581(i)'s reference only to "imports" immaterial:

> True, § 1581(i) does not use the word "exports." But that is hardly surprising in view of the Export Clause, which confines customs duties to imports. Revenue from imports and revenue from customs duties are thus synonymous in this setting. In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§] 1581(i)(1)."

Pet. App. 106a (quoting Pet. App. 46a).

The very purpose of Section 4462(f) is thus to ensure that the substantive and jurisdictional provisions of the customs laws govern the HMT notwithstanding that the tax applies to exporters, not merely "importers," and in that respect does not

call for an "entry," a "liquidation," or a "reconciliation." Congress intended that the courts ignore those differences in applying the customs laws so that it could avoid revising those statutes wholesale.

It is therefore clear that Section 1505(b) uses the words "on a liquidation or reliquidation" simply to refer to the ordinary method of calculating a refund, with interest, of duties on imports – the duties to which the customs laws usually apply. Pet. App. 130a. There is no reason to believe Congress intended to permit Customs to circumvent its duty to pay a refund and interest by employing a particular *method* to collect the HMT or determine the amount owed to the exporter. This case is a perfect example: no technical mechanism need (or logically would) be used to determine the amount owed because this Court has held that every single cent exacted pursuant to the HMT is unconstitutional as applied to exports. To the extent the timing provision of Section 1505(c) is inapplicable, that is no obstacle to an award of otherwise-owing interest, which obviously runs from the date the government received the principal.[6]

Indeed, the Customs Service itself acknowledged – outside the self-interested context of this litigation – that Section 4462 unmistakably commanded that interest be available under Section 1505. After Congress adopted Section 1505 in its current form, Customs issued a draft notice of proposed rulemaking setting forth its views on how the statute applied to other customs laws. See Pet. 140a-43a (excerpting relevant

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[6] At the very least, Customs was compelled under 26 U.S.C. 4462(f)(1) to utilize the standard tools of "entries" and "liquidations" in calculating and collecting the HMT because Congress directed Customs to administer the HMT as if it "were a customs duty." See 19 U.S.C. 1500. Customs cannot use its own failure to follow that clear command to frustrate Congress's intent to award interest.

provisions).[7] Customs acknowledged that, in light of Section 4462, "section [1505] interest principles [apply] * * * even where the final amount of the required fee payment *is not finally determined in connection with a liquidation or reliquidation.*" *Id.* 141a (emphasis added). Customs thus acknowledged that it was "*required* to apply the rules and principles of section [1505]" to the HMT because it "believe[d] that section [1505] is one of the customs laws which by Congressional *mandate* applies to the fees and taxes Customs collects pursuant to [the HMT]." *Id.* (emphases added). Customs specified that this conclusion included the application of Section 1505's "interest provisions to * * * the port use (harbor maintenance) fee applicable * * * to the export * * * of merchandise," such that "interest accrues on overpayments of all fees from the date the fee was deposited with Customs." *Id.* 141a-142a.

2. Congress separately waived the government's immunity from interest in a provision of the Judicial Code, 28 U.S.C. 2411. That statute provides: "In any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed * * *."

The Federal Circuit did not doubt that "the structure and the content of the HMT point toward it being an internal revenue tax, and thus entitled on refund to the interest award provided under § 2411." Pet. App. 123a. The court of appeals thus recognized that the Harbor Maintenance *Tax* is

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[7] During the appellate proceedings in *U.S. Shoe I*, Customs withheld action on the notice. After this Court's decision invalidating the HMT, Customs issued a new proposed rulemaking but omitted its prior acknowledgment of a right to interest. 64 Fed. Reg. 56,433 (Oct. 20, 1999). Petitioner is including the original draft notice in the appendix because Customs appears to have deleted the document from its electronic bulletin board during the course of the appellate litigation over the right to interest on HMT refunds.

codified in the Internal Revenue Code and "is clearly derived from internal sources — the U.S. exporter." *Id.* The Federal Circuit nonetheless held that interest is not available in light of 26 U.S.C. 4462(f)(3). That statute provides that the HMT "shall not be treated as a tax for purposes of subtitle F [of the Internal Revenue Code] or any other provision of law relating to the administration and enforcement of internal revenue taxes." The court of appeals acknowledged that Section 2411's provision for the award of interest is codified in the Judicial Code, not the Internal Revenue Code, but held that Section 2411 "relates to the administration and enforcement" of taxes, which it defined to mean "enforcement of the tax laws, including the obtaining and enforcement of judgments against both taxpayers and the United States." Pet. App. 125a.

The court of appeals erred because it failed to recognize the limited role of Section 2411. That statute is not a directive to the Internal Revenue Service to award refunds, nor does it implement any provision of law contained in the Internal Revenue Code. Rather, it is a separate authorization in the Judicial Code for courts to include interest on refunds that they award to taxpayers. The statute merely provides that "[i]n any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed * * *." 28 U.S.C. 2411. Section 2411 is thus not a "provision of law relating to the administration and enforcement of internal revenue taxes" (26 U.S.C. 4462(f)(3)).

That conclusion is apparent from the contrast between Section 2411 and those statutes that direct agencies to award refunds with interest. Thus, 26 U.S.C. 6611 governs the IRS directly and provides: "Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax * * *." In addition, 19 U.S.C. 1505, discussed *supra*, directs the Customs Service specifically to award refunds and interest in certain circumstances. Both 26 U.S.C. 6611 and 19 U.S.C. 1505 are thus properly understood to "relate to the admini-

stration and enforcement" of, respectively, the tax and customs laws.

For the foregoing reasons, Sections 1505 and 2411 confer upon exporters a right to interest. Congress clearly intended that interest be paid on both illegally collected taxes and illegally assessed customs duties. As a drafting short-cut, Congress shunted certain questions regarding its Harbor Maintenance Tax to provisions of the customs laws. Those provisions refer only to import duties, not export duties, because the latter violate the Constitution. From this the government and the court below conclude that Congress, which repeatedly indicated its wish that interest be paid on illegal exactions, has not succeeded in ordering payment of interest on illegally exacted export duties by any route. This Court rejected such a Catch-22 interpretation in respect to the CIT's jurisdiction in *U.S. Shoe I* and should reject it here as well.

But even if the Court were to conclude that Congress did not waive the government's immunity and thus inadvertently permitted the utterly unjust outcome reached below, certiorari would be warranted to decide a second question: is the "no-interest" presumption even applicable here? As petitioner now shows, the answer to that question is "no," and this Court should furthermore recognize the inapplicability of sovereign immunity to the award of interest in such cases so as to avoid the substantial constitutional questions that would otherwise arise. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

III. Certiorari Should Be Granted To Determine Whether A Waiver Of The Government's Immunity From Interest Is Required.

1. The Federal Circuit rejected the argument that the Export Clause itself requires the payment of interest as part of the compensation for the government's flat violation of the Export Clause. In particular, the court of appeals found dispositive the fact that, unlike the Export Clause, the Takings Clause includes "the restorative clause, 'without just compen-

sation.'" Pet. App. 11a. That decision conflicts with the text of the Export Clause and with this Court's precedents. As this Court has concluded on the basis of the text and history, "the original impetus may have had a narrow focus, [but] the *remedial provision* that ultimately became the Export Clause *does not*." *United States* v. *IBM Corp.*, 517 U.S. 843, 859-60 (1996) (emphases added).

The Constitution's Export Clause is categorical. Its "simple, direct, unqualified prohibition on any taxes or duties," this Court previously explained in this case, "distinguishes it from other constitutional limitations on governmental taxing authority." Pet. App. 108a. Although the framers in other provisions mandated, for example, "*just* compensation" (U.S. CONST. amend. V) and "*due* process" (*id.*), in the Export Clause they clearly and succinctly commanded: "*No* Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The "proponents of the Clause fully intended the breadth of scope that is evident in the language." *IBM*, 517 U.S. at 859-60. The framers could not have intended the categorical prohibition of the Constitution's text against any export tax to have *less* force and effect than the Fifth Amendment's more permissive provision allowing the taking of private property so long as just compensation is provided.

The categorical text of the Export Clause reflects the framers' expansive purposes. Although some favored crafting a provision that more narrowly would prevent the government from using exports as a source of general tax revenues, a broader conception of the Clause as a protection of exports prevailed. More than a century ago, this Court explained:

> [T]he purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue" but the motion was

> voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.

Fairbank v. *United States*, 181 U.S. 283, 292-93 (1901). As this Court previously concluded in this case, the framers responded to the "concern[] that Northern States would tax exports to the disadvantage of Southern States by *completely* denying to Congress the power to tax exports *at all*." Pet. App. 108a (quoting *IBM*, *supra* 517 U.S. at 861) (emphasis added).

The Federal Circuit's decision runs contrary to both of these purposes of the Export Clause recognized in *Fairbank*. The government's retention of the proceeds earned while the funds paid by exporters have been held in the Harbor Maintenance Trust Fund manifestly constitutes a prohibited "source of revenue to the National Government." *Fairbank*, 181 U.S. at 292. Further, the government's failure either to pay interest as the lost time-value of the exporters' money or to disgorge the proceeds actually earned would be a profound "burden upon such exports." *Id.* at 293. The Export Clause prohibits restraining exports through even $1 in taxation. It cannot seriously be imagined that the Clause permits exporters to suffer the burden of effectively losing the value of *$700 million* as a result of an admittedly unconstitutional tax on exports.

Finally, the Federal Circuit's textual reasoning produces absurd results. The court took an "*expressio unius*"-like approach to the fact that only the Takings Clause has a "just compensation" requirement. That reasoning attributes to the framers the intent that the Constitution's other clauses prohibiting the government from seizing funds in certain circumstances – including not only the Export Clause but also the Import/Export Clause – provide the victims of the government's unconstitutional acts either no refund *at all* or, at most, compensation that is less than "just." That is absurd, and

even the Federal Circuit has previously held that "[t]he necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted. * * * [A]bsent a prompt restoration of [such] money * * *, the Export Clause would be more hollow than real because in the event that Congress imposed export taxes, equitable relief alone could not ameliorate the harm." *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369, 1373-74 (2000), *cert. denied*, 532 U.S. 1065 (2001).

2. At the very least, no express waiver of the government's immunity is needed when the government is required to refund *significant profits that it has actually earned* on unlawful exactions. See *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). In *Henkels*, the federal government unlawfully seized the petitioner's securities pursuant to the Trading with the Enemy Act, sold the securities, and deposited the proceeds into an interest-bearing account where they were commingled with other monies. This Court held the petitioner was entitled not only to a refund but also to the government's earnings from investing the sale of his securities. *Id.* at 301.

The Court recognized the basic rule that "[t]he Government cannot be sued without its consent; and, accordingly, it cannot be sued for interest unless it consents to be liable therefor." 271 U.S. at 301. But the Court explained that "the claim here is not for interest to be paid by the United States in the sense of the [no-interest] rule. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession * * *." *Id.* The government "cannot confiscate the actual increment of property belonging to a citizen * * * any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution." *Id.*

The Sixth and Ninth Circuits have reached the same conclusion and would require the government to disgorge the proceeds it earns. Those courts would reason that "the inter-

est earned on the money in an interest-bearing account would become part of, and would be substituted for (along with the original amount) the *res*." *United States* v. *$277,000*, 69 F.3d 1491, 1496 (CA9 1995). On this question, "the circuits are split" (*United States* v. *$30,006.25*, 236 F.3d 610, 613 (CA10 2000)) four-to-two. Accord U.S. C.A. Br. 46 ("the courts are split").[8] Although the appellate decisions giving rise to the conflict arose from unlawful forfeitures – and Congress has recently provided for the award of interest in that specific circumstance (28 U.S.C. 2465(b)(1)(C)) – the conflict is applicable generally to all unlawful exactions of money. *E.g.*, *E. W. Scripps Co.* v. *United States*, 2002 U.S. Dist. LEXIS 20283 (S.D. Ohio Sept. 16, 2002) (holding that right to interest on refund of tax overpayment existed under Sixth and Ninth Circuits' view that no waiver of immunity is required). Although no challenge to the HMT can actually arise in the Sixth or Ninth Circuits, it is a testament to the seriousness of the issue that two courts of appeals would hold that petitioner has a right to the proceeds earned by the government on petitioner's HMT payments.

This case presents the strongest possible circumstance for holding that no waiver of the government's sovereign immunity from interest is required where the government has realized actual proceeds, because a contrary ruling (such as the holding of the Federal Circuit in this case) would raise serious constitutional questions. Precedents under three constitu-

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[8] The Sixth and Ninth Circuits hold that no waiver is required. *United States* v. *$515,060.42*, 152 F.3d 491, 504-06 (CA6 1998); *United States* v. *$277,000*, 69 F.3d 1491 (CA9 1995); see also *United States* v. *$133,735.30*, 139 F.3d 729, 731-32 (CA9 1998); *United States* v. *$40,000*, 1998 U.S. Dist. LEXIS 14649 (D.P.R. Sept. 1, 1998). The First, Second, Eighth, and Tenth Circuits disagree. *Larson* v. *United States*, 274 F.3d 643 (CA1 2001); *$30,006.25*, 236 F.3d at 614-15; *United States* v. *$7,990*, 170 F.3d 843, 845-46 (CA8 1999); *Ikelionwu* v. *United States*, 150 F.3d 233, 238-39 (CA2 1998).

tional provisions – the Export, Takings, and Due Process Clauses – establish that exporters have a *constitutional* right to the proceeds earned by the government on the HMT funds.

In addition to the authorities cited above under the Export Clause, petitioner presents a substantial argument that the government is required by the Takings and Due Process Clauses to disgorge the proceeds it actually earned on the HMT. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980); *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring) (distinguishing challenge to general tax from claimed right to "accrued interest"). The Federal Circuit rejected those arguments on the ground that "[t]he tax revenue here was not held by the government as property of U.S. Shoe. It became the property of the Treasury upon payment, and was appropriated to the Harbor Maintenance Trust Fund along with" HMT payments by parties other than exporters. Pet. App. 8a. Furthermore, the HMT "served the rational purpose of maintaining the ports": "'Congress mandated that fees collected from the HMT be used only for commercial navigation projects.'" *Id.* 9a (quoting Mayer, C.J., dissenting from Federal Circuit's holding in *U.S. Shoe I* that HMT violated the Export Clause).

The Federal Circuit's reasoning is open to serious question and merits further review. As a constitutional matter, the court of appeals certainly erred in relying on the fact (Pet. App. 8a) that the government "held" the HMT payments as its own rather than as the property of the exporters. Although the HMT payments were in the government's hands, and the government refused to acknowledge their rightful ownership, the money plainly was the "property" of the exporters all along. That is so because the government's action was unconstitutional, and "what a court does with regard to an unconstitutional law is simply to *ignore* it. It decides the case '*disregarding the [unconstitutional] law*,' because a law repugnant to the Constitution 'is void, and is as no law.' *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 760 (1995)

(Scalia, J., concurring) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1880); *Ex parte Siebold*, 100 U.S. 371, 376 (1880)) (emphases and alteration in original). Cf. *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 320 (1987) (rejecting the argument that "no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid").

The Federal Circuit next relied on the fact that, although the Harbor Maintenance Trust Fund by statute contains only HMT payments and the proceeds earned by the government on those payments (see 26 U.S.C. 9505, 9602(b)), the HMT was not paid exclusively by exporters. Pet. App. 8a. This Court's jurisprudence, however, has never attributed such controlling significance to the concept of a "discrete fund," which on the Federal Circuit's view is an invitation to the government to circumvent the Fifth Amendment by submerging all exacted funds within some larger account.

Finally, it is no answer to petitioner's argument that Congress had a "rational purpose of maintaining the ports" (Pet. App. 9a) when it enacted the HMT. This is not a case in which government action is challenged on the single ground of "irrationality," as would be the case if petitioner argued that the HMT bore no rational relationship to preservation of the port system. Petitioner instead argues that the Constitution does not permit the government to profit from its utterly unconstitutional conduct. When the government has employed unconstitutional *means*, it is no defense that its purpose was entirely legitimate. The Fifth Amendment thus does not permit the government to "take" private property without just compensation for a "rational" reason. Nor is the protection against "arbitrary" government action provided by the Due Process Clause (*e.g.*, *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986); *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (1972)) – which is surely implicated when the government seeks to profit enormously from its own unlawful conduct to the detriment of individuals forced to pay an unconstitutional tax –

vitiated by the fact that the government had a "rational" reason for wanting to violate the Constitution.

Put another way, the Federal Circuit addressed the wrong question. The pertinent question for purposes of the Takings and Due Process Clauses is not whether the tax itself was arbitrary, but instead, *once it was determined that the assessment was unconstitutional*, whether there would be any rational, nonarbitrary basis for the government to retain the proceeds it made from its investment of that unconstitutional assessment, where the legislature itself regularly recognizes, in analogous contexts, that equity requires the return of such benefits to the innocent taxpayer. There is no such rational basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 19, 2003

APPENDIX

UNITED STATES SHOE CORPORATION,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

No. 98-1574

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

296 F.3d 1378; 2002 U.S. App. LEXIS 14776;
2002-2 U.S. Tax Cas. (CCH) P70,186;
90 A.F.T.R.2d (RIA) 5376

July 23, 2002, Decided

SUBSEQUENT HISTORY:

Rehearing En Banc Denied October 22, 2002, Reported at: 2002 U.S. App. LEXIS 23176.

PRIOR HISTORY:

Appealed from: United States Court of International Trade. Judge Jane A. Restani. *United States Shoe Corp. v. United States*, 22 Ct. International Trade 613, 1998 Ct. Intl. Trade LEXIS 76, (1998)

DISPOSITION: REVERSED.

COUNSEL:

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Jeffrey A. Belkin, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director; Jeanne E. Davidson, Deputy Director; and Todd M. Hughes, Assistant Director. Of counsel on the brief was Richard McManus, Office of the Chief Counsel, United States Customs Service, of Washington, DC. Of counsel was Lara Levinson, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC.

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JUDGES:

Before MAYER, Chief Judge, RADER and BRYSON, Circuit Judges.

OPINION BY:

MAYER

OPINION:

MAYER, Chief Judge.

The United States appeals the judgment of the Court of International Trade granting United States Shoe Corporation's motion for payment of interest on its refund of the Harbor Maintenance Tax. *United States Shoe Corp. v. United States*, 22 C.I.T. 613, 20 I.T.R.D. (BNA) 1703 (Ct. Int'l Trade 1998). Because the payment of interest is not mandated by statute or the Constitution, we reverse.

Background

The Harbor Maintenance Tax was enacted by Congress as part of the Water Resources Development Act of 1986. 26 U.S.C. §§ 4461-4462 (2000). It levied a 0.125 percent ad valorem tax on commercial cargo for any port use. *Id.* § 4461(b). In 1995, the Court of International Trade decided that the tax imposed on exports was unconstitutional because it violated the Export Clause's mandate that "no Tax or Duty shall be laid on Articles exported from any State," U.S. Const. art. I, § 9, cl. 5. See *United States Shoe Corp. v. United States*, 19 C.I.T. 1284, 907 F. Supp. 408 (Ct. Int'l Trade 1995). The court then decided that in addition to a refund of the tax payment, interest was due pursuant to 28 U.S.C. § 2411. *United States Shoe Corp. v. United States*, 20 C.I.T. 206 (Ct. Int'l Trade 1996). The award of interest was stayed until appellate proceedings on the constitutionality of the tax were complete.

On appeal, this court agreed that the tax was unconstitutional, *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), and the Supreme Court affirmed, stating that the tax "is not a fair approximation of services, facilities, or benefits furnished to exporters, and therefore does not qualify as a permissible user fee," *United States v. United States Shoe Corp.*, 523 U.S. 360, 363, 140 L. Ed. 2d 453, 118 S. Ct. 1290 (1998). The stay on the payment of interest dissolved, and pur-

suant to its 1996 judgment, the Court of International Trade awarded U.S. Shoe interest. The United States asks that we reverse the judgment. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

Discussion

We review statutory interpretation by the Court of International Trade without deference. *Saarstahl AG v. United States*, 78 F.3d 1539, 1542 (Fed. Cir. 1996). Constitutional interpretation is also a question of law, which we review de novo. *Florida Sugar Mktg. & Terminal Ass'n, Inc. v. United States*, 220 F.3d 1331, 1333 (Fed. Cir. 2000). A court may fashion equitable remedies, but it may not abuse its discretion in doing so. *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000). An equitable remedy here must not be (1) clearly unreasonable, arbitrary or fanciful or (2) based on an erroneous conclusion of law. *Institut Pasteur & Genetic Sys. Corp. v. Cambridge Biotech Corp.*, 186 F.3d 1356, 1369 (Fed. Cir. 1999).

Interest may only be recovered in a suit against the government if there has been a clear and express waiver of sovereign immunity by contract or statute, or if interest is part of compensation required by the Constitution. *Library of Congress v. Shaw*, 478 U.S. 310, 311, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 47, 73 L. Ed. 170, 49 S. Ct. 52 (1928). U.S. Shoe argues that interest is due on its payment of the Harbor Maintenance Tax under (1) statutory provisions providing for the payment of interest, (2) the Takings and Export Clauses of the Constitution, and (3) the discretionary power of a court to fashion equitable remedies.

I.

The government argues that the Court of International Trade erred in awarding U.S. Shoe interest because the United States has not expressly consented to such an award, relying on *International Business Machines Corp. v. United States*, 201

F.3d 1367, 1374 (Fed. Cir. 2000). We agree. IBM looked to the statutes which waived immunity to pay interest and concluded that neither a tax related statute, 28 U.S.C. § 2411, nor customs related statutes, 28 U.S.C. § 2644 and 19 U.S.C. § 1505, permitted the award. *Id.*

First, 28 U.S.C. § 2411 provides: "In any judgment of any court rendered ... for any overpayment in respect of any internal-revenue tax, interest shall be allowed from the date of the payment" *IBM* held that the Harbor Maintenance Tax statute, 26 U.S.C. § 4462, expressly prohibited the application of section 2411 because it is a tax law, and not a customs law. 201 F.3d at 1372. Section 4462(f)(1) states that "all administrative and enforcement provisions of customs laws and regulations shall apply .. as if such tax were a customs duty." "Administration and enforcement" encompass the "assessment and collection of tax payments and issuance of refunds and interest on those refunds." 201 F.3d at 1372. Because section 2411 does not apply to refunds of the tax, *id.* at 1373, the Court of International Trade improperly awarded U.S. Shoe interest under it.

Second, 28 U.S.C. § 2644 provides for post-summons interest for claims that invoke the Court of International Trade's jurisdiction under 28 U.S.C. § 1581(a). For review under this subsection, a party must have filed a protest under section 515 of the Tariff Act of 1930. 28 U.S.C. § 1581(a) (2000). In IBM, section 1581(a) jurisdiction was not invoked because IBM did not file a customs protest; therefore section 2644 interest could not be awarded. 201 F.3d at 1374. Instead, jurisdiction in IBM arose under section 1581(i), the residual jurisdiction provision. *Id.* Likewise in this case, the Supreme Court held that jurisdiction was proper under section 1581(i), *U.S. Shoe*, 523 U.S. at 365, thereby prohibiting an award of section 2644 interest.

Third, 19 U.S.C. § 1505 provides for prejudgment interest, and states in relevant part that "interest on excess moneys deposited shall accrue ... from the date the importer ... deposits estimated duties, fees, and interest ... to the date of liquidation

or reliquidation of the applicable entry or reconciliation [of the imports]." 19 U.S.C. § 1505(c) (emphases added). IBM held that section 1505(c) does not apply to exports because it speaks only to imports and declined to rewrite the "Congressional enactment to make it fit a case for which it was clearly not intended." 201 F.3d at 1374.

U.S. Shoe and amicus argue that IBM's interpretation is too restrictive, and that section 1505(c) should apply to exports as well as imports. They rely by analogy on the Supreme Court's holding that review of the Harbor Maintenance Tax on exports could be heard under the Court of International Trade's jurisdictional statute, section 1581(i), referring only to imports: "True, § 1581(i) does not use the word 'exports.' But that is hardly surprising in view of the Export Clause, which confines customs duties to imports." *U.S. Shoe*, 523 U.S. at 366. U.S. Shoe urges that "exports" be read into section 1505(c) also. The Court, however, was reviewing the entire statute, and the tax on imports provided a sufficient basis for jurisdiction because the "HMT statute, although applied to exports here, does apply equally to imports." *Id.* We believe the Court's reasoning is sound for the purpose of establishing jurisdiction, but an insufficient basis upon which sovereign immunity may be waived in light of the "Supreme Court's mandate that Congress must expressly consent to an award of interest." *IBM*, 201 F.3d at 1374.

II.

The government also argues that the Constitution does not mandate the payment of prejudgment interest. We agree. The Harbor Maintenance Tax was not a taking, but a violation of the Export Clause, for which no prejudgment interest is due. If not granted by statute, the Supreme Court has held only the Fifth Amendment of the Constitution to mandate the payment of interest. *Shaw*, 478 U.S. at 317 n.5; *Smyth v. United States*, 302 U.S. 329, 353-54, 82 L. Ed. 294, 58 S. Ct. 248 (1937); *Boston Sand & Gravel*, 278 U.S. at 47. The Fifth Amendment states that private property shall not be "taken for public use, without just compensation." U.S. Const. amend. V. The princi-

ple that the "just compensation" language includes the payment of interest from the time of the taking is long standing. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306, 67 L. Ed. 664, 43 S. Ct. 354 (1923) ("The requirement that 'just compensation' shall be paid is comprehensive ... and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.").

U.S. Shoe argues that the Harbor Maintenance Tax was a taking in violation of the Fifth Amendment because it was an unlawful confiscation of its property. We do not agree. The government's act of taxation here was not a per se taking of private property. *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989) (considering and rejecting the view that money is private property that can be physically occupied by the government: "Unlike real or personal property, money is fungible."). Nor is the tax a regulatory taking: "Regulatory actions requiring the payment of money are not takings." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (en banc) (relying on the reasoning of five justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998)); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property.").

A "reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." *Sperry*, 493 U.S. at 63. The Harbor Maintenance Tax was imposed to "defray the cost of harbor development and maintenance." *U.S. Shoe*, 523 U.S. at 370. In *Pace v. Burgess*, 92 U.S. 372, 375, 23 L. Ed. 657 (1875), a stamp fee placed on packages of tobacco for export was upheld because it "bore no proportion whatever to the quantity or value of the package on which it was affixed" and was not excessive. Here, the fee was declared unconstitutional because it was proportional to the value of the exported goods and not the actual use of the harbors. *U.S. Shoe*, 523 U.S. at 369 ("The connection between a service the Government renders and the compensation it receives for that service must

be closer than is present here ... the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires."). But it was not excessive. Under *Sperry*, a user fee of 1.5 percent "does not qualify as a 'taking' by any standard of excessiveness." 493 U.S. at 62. Similarly, purely by its amount, 0.125 percent, 26 U.S.C. § 4461(b) (2000), the Harbor Maintenance Tax must be considered reasonable. Because "the Takings Clause is less restrictive than the Export Clause," *U.S. Shoe*, 523 U.S. at 369, and the tax would be sustained if it "fairly matched the exporters' use of port services and facilities," *id.* at 370, we conclude that the tax did not rise to the level of a taking.

U.S. Shoe also contends that the government's retention of the interest income earned on the tax revenue is a continuing taking. But U.S. Shoe has not established a private property right in the interest generated by the payment of the tax. See *Eastern Enterprises*, 524 U.S. at 543 (Kennedy, J., concurring). The Harbor Maintenance Tax did not "appropriate, transfer, or encumber an estate in land ..., a valuable interest in an intangible ..., or even a bank account or [its associated] accrued interest." *Id.* at 540. For the accrued interest to rise to the level of private property, the principal must be held in an identified private account. See *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998) (stating that client fees held in trust accounts constituted "private property"). And then any interest accrued belongs to the owner of the principal. *Id.* at 172 (holding that the "interest income generated by funds held in IOLTA accounts [client accounts] is the 'private property' of the owner of the principal"). The tax revenue here was not held by the government as property of U.S. Shoe. It became the property of the Treasury upon payment, and was appropriated to the Harbor Maintenance Trust Fund along with user fees on imports, passenger cruise ships, and domestic shipments, and other statutory fees. 26 U.S.C. § 9505(b) (2000). Accordingly, the interest earned on the tax

payments is also the property of the government. And its use for harbor maintenance expenditures, *id.* § 9505(c), cannot be a taking.

U.S. Shoe also argues that the Harbor Maintenance Tax was so arbitrary that it was an egregious violation of due process, and therefore a taking. See *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24-25, 60 L. Ed. 493, 36 S. Ct. 236 (1916) ("Although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking ...."). We do not agree. The tax was not arbitrary because it served the rational purpose of maintaining the ports. See *U.S. Shoe*, 114 F.3d at 1579 (Mayer, C.J., dissenting) ("Congress mandated that fees collected from the HMT be used only for commercial navigation projects."); see also *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 547, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (White, J., dissenting on other grounds) (statutes restrictive of liberty must have "an ascertainable purpose and represent a rational means to achieve that purpose ...."). The Court struck down the tax because it was improperly calculated, not because its purpose was unascertainable or nefarious. *U.S. Shoe*, 523 U.S. at 363, 370 (The tax was not "a fair approximation of services, facilities, or benefits furnished to the exporters," but "this does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance."). Moreover, the tax cannot be a taking because the Supreme Court determined that the tax violated the Export Clause, not the Takings Clause. *Id.* at 368 ("Those decisions [discussing user fees] [including *Sperry*, a takings case] involved constitutional provisions other than the Export Clause, however, and thus do not govern here.").

In the alternative, U.S. Shoe argues that the Export Clause mandates the payment of interest. It cites *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000), that a claim against the government for a violation of the Export

Clause is money mandating, and requires "a return of money unlawfully exacted." *Cyprus Amax*, however, was premised on the award of money damages to U.S. Shoe "equaling the amount exacted under the HMT" only, *id.* at 1374; *U.S. Shoe*, 114 F.3d at 1577, and does not discuss, nor stand for the proposition that interest must be awarded.

U.S. Shoe also relies on *Hatter v. United States*, 38 Fed. Cl. 166 (1997), to assert that violations of constitutional clauses other than the Takings Clause require the payment of interest. In *Hatter*, the Court of Federal Claims decided that judges were due interest on money owed because of an Article III Compensation Clause violation. *Id.* at 183. See also *Hatter v. United States*, 64 F.3d 647, 653 (Fed. Cir. 1995), aff'd in part, rev'd in part, *Hatter v. United States*, 532 U.S. 557, 149 L. Ed. 2d 820, 121 S. Ct. 1782 (2001) (affirming that discriminatory taxes imposed on sitting judges violated the Compensation Clause). The interest issue, however, was not appealed by the government, and the final judgment of the Court of Federal Claims is not binding upon us. *Aleman Food Servs., Inc. v. United States*, 994 F.2d 819, 822 (Fed. Cir. 1993). Even if interest is mandated under the Compensation Clause, the reasoning upon which this conclusion is based does not extend to the Export Clause.

Under the Compensation Clause, "Judges ... shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. The construction of the Export Clause differs from the Compensation Clause. The Export Clause is prohibitive, "No Tax or Duty shall be laid on Articles exported from any State," U.S. Const. art. I, § 9, cl. 5, while the Compensation Clause requires that judges shall receive "Compensation." Such "Compensation" must be paid at "stated Times," indicating that if it is not paid when due, interest should be paid to compensate for the delay. *Hatter*, 38 Fed. Cl. at 183. And the rationale, that the government should pay interest if it un-

unlawfully withholds judges' pay to maintain the separation of powers, does not apply to the Export Clause. *Id.*

Like the Export Clause, the Takings Clause is also prohibitive, "nor shall private property be taken for public use," but it is coupled with the restorative clause, "without just compensation." U.S. Const. amend. V. The Export Clause's prohibition lacks similar remedial language. U.S. Shoe asserts, nevertheless, that the Supreme Court's reasoning in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 37 L. Ed. 463, 13 S. Ct. 622 (1893), reading "compensation" to require the "full and perfect equivalent for the property taken," and its subsequent interpretation that such compensation requires the payment of interest, *Seaboard Air Line*, 261 U.S. at 305-06, applies to the Export Clause. And because a violation of the Export Clause requires a return of the money excised, its perfect equivalent entails both principal and interest. We are unwilling to import the Court's interpretation of "Compensation" into the Export Clause where the word "compensation" does not appear. Instead, we prefer to "follow the express textual command of the Export Clause." *United States v. Int'l Bus. Machs.*, 517 U.S. 843, 862, 135 L. Ed. 2d 124, 116 S. Ct. 1793 (1996); see also *id.* at 857 ("We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. ... Meaningful textual differences exist and should not be overlooked.").

III.

Finally, the government argues that principles of equity are insufficient to waive the government's sovereign immunity. We agree. The equitable doctrine of restitution and unjust enrichment are powerful remedies of fairness. But true to the "no-interest rule," under which a waiver of sovereign immunity for an award of interest must be affirmative and unequivocal, *Shaw*, 478 U.S. at 311, the foregoing analysis demonstrates that a judge-fashioned remedy here would be an abuse of discretion. See *IBM*, 201 F.3d at 1374; *Kalan, Inc. v. United States*, 944

F.2d 847, 850 (Fed. Cir. 1991) ("Neither we nor the Court of International Trade can supply by creative interpretation the necessary clear direction [to award interest] that Congress omitted.").

Conclusion

Accordingly, the judgment of the Court of International Trade is reversed.

UNITED STATES SHOE CORP.
Plaintiff,
v.
THE UNITED STATES
Defendant.

Court No. 94-11-00668

UNITED STATES COURT OF INTERNATIONAL TRADE

20 C.I.T. 206; 1996 Ct. Intl. Trade LEXIS 45; SLIP OP. 96-32

February 7, 1996, Dated

DISPOSITION:

Interest on HMT payments challenged pursuant to 28 U.S.C. § 1581(i) may be awarded pursuant to 28 U.S.C. § 2411.

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JUDGES:

Jane A. Restani, Judge

OPINION BY:

Jane A. Restani

OPINION:

MEMORANDUM OPINION

RESTANI, Judge: The judgment in this action awarded plaintiff $ 8,281.87, "together with interest and costs as provided by law." *U.S. Shoe Corp. v. United States*, 924 F. Supp. 1191, 1995 Ct. Intl. Trade LEXIS 247, Slip Op. 95-197 (Dec. 4, 1995); see also *U.S. Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). It has come to the court's attention that "interest" is not a matter without controversy and it cannot be resolved as a simple clerical matter. Since the briefing of this issue, however, notice of appeal has been filed and the court lacks jurisdiction to alter the judgment.

Because the issue has been fully briefed under the captioned case by the attorneys involved in the numerous cases stayed hereunder, because the issue is relevant to the lifting of stays as to such cases, and for administrative convenience, the court will address this matter under this caption. At the outset, the court notes that in the absence of express congressional consent, the United States is immune from an interest award. *Library of Congress v. Shaw*, 478 U.S. 310, 314, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986). Interest is, however, available to claimants when Congress permits such interest to be awarded by statute. Id. at 316.

Plaintiff and amici contend that interest on plaintiff's payments of the Harbor Maintenance Tax ("HMT") is expressly provided for by 28 U.S.C. § 2411 (1988). That statute provides, in relevant part:

> In any judgment of any court rendered (whether against the United States, ...) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment, from the date of the payment

> or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, ...

The Supreme Court has recognized that section 2411 constitutes an express waiver of sovereign immunity with respect to interest and expressly authorizes prejudgment and postjudgment interest payable by the United States in tax-refund cases. *Sahw*, 478 U.S. at 218 n.6. Furthermore, section 2411 applies when taxes are improperly and illegally collected. *Sterns v. Clauson*, 122 F. Supp. 795, 797 (D. Me. 1954).

This court has held that the HMT on exports constitutes a tax prohibited by the Export Clause of the Constitution. *U.S. Shoe Corp.*, 907 F. Supp. at 418. The HMT is a tax provided for by the Internal Revenue Code. See 26 U.S.C. §§ 4461-62 (1994).

Congress, however, has expressly provided in the Water Resources Development Act of 1986, 26 U.S.C. §§ 4461-62, that the HMT is to be treated as a customs duty for the purposes of administration and enforcement as well as jurisdiction. See *id.* § 4462(f)(1)-(2). Additionally, section 4462(f) (3), Title 26, United States Code, provides, in relevant part, that "the tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle for any other provision of law relating to the administration and enforcement of internal revenue taxes." *Id.* § 4462(f)(3) (emphasis added).

The court finds, however, that any monetary relief granted by the court would not constitute either "administration" or "enforcement" of the HMT as envisioned by 26 U.S.C. § 4462(f)(3). That section is limited to matters of routine administration and enforcement by an agency. The legislative history of the HMT statute explains that the underlying purpose of both section 4462(f)(1) and (3) was to confirm which agency was to

have responsibility for collecting and processing HMT payments. See S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714-15 (stating Customs' strong presence at ports of entry and experience at appraising imported merchandise made it appropriate for Customs, rather than Internal Revenue Service to collect, administer, and enforce HMT). The court also notes that while Congress expressly sought to preclude application of the administrative provisions of the Internal Revenue Code in the collection and processing of the HMT, section 2411 is within Title 28 of the United States Code, which governs the judiciary and judicial procedure, rather than an administrative provision within Title 26 (the Internal Revenue Code).

Furthermore, a money judgment for customs duties protested by ordinary administrative and judicial procedures would include interest calculated in a manner similar to that provided for in 28 U.S.C. § 2411. See 19 U.S.C. § 1520(d) (1988); 19 U.S.C. § 1505(c) (1994); 28 U.S.C. § 2644 (1988). Defendant correctly maintains that these statutory provisions, however, do not apply to payments of the HMT where no decision by Customs has been made or no liquidation has occurred. Defendant further maintains that as section 2411 requires the Commissioner of Internal Revenue to take an active role in tendering and setting the date of payment, Congress could not have intended section 2411 to apply to payments of the HMT. The court notes that the issue of how payments of any type are to be made is one of administration. Under the statutory scheme, Customs, not the Commissioner, is required to collect payments of the HMT. The court finds that requiring the Commissioner, rather than Customs, to tender and set the date of payment under a strict literal reading of section 2411 or obviating the requirement of interest because Customs administers the statute but did not provide a decision or liquidation, would be illogical and contrary to legislative intent. See *Witco Chem. Corp. v. United States*, 742 F.2d 615, 619 (Fed. Cir. 1984) ("An absurd construction of a statutory provision should be

avoided."); see also *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1983) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Reading the applicable statutes in pari materia and finding defendant's interpretation of 28 U.S.C. § 2411 and 26 U.S.C. § 4462 as read together unreasonable, the court must construe the statutes, keeping in mind that "all statutes must be construed in light of their purpose." *Wassenaar v. Office of Personnel Mgmt.*, 21 F.3d 1090, 1096 (Fed. Cir. 1994) (quoting *Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172, 1175 (Fed. Cir. 1993)); see also *Marlowe v. Bottarelli*, 938 F.2d 807, 813 (1991) (stating rule that "whenever possible courts construe statutes and regulations in pari materia"). The court finds that in actions brought pursuant to 28 U.S.C. § 1581(i) (1988 & Supp. V 1993), Congress intended to provide interest on payments of the HMT for exports pursuant to section 2411, but that related administrative actions would be performed by Customs.

Jane A. Restani

JUDGE

Dated: New York, New York, This 7th day of February, 1996.

UNITED STATES SHOE CORP.,

Plaintiff,

v.

UNITED STATES,

Defendant

Court No. 94-11-00668

UNITED STATES COURT OF INTERNATIONAL TRADE

19 C.I.T. 1284; 907 F. Supp. 408; 1995 Ct. Intl. Trade LEXIS 220; SLIP OP. 95-173

October 25, 1995, Decided

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Corporation, International Business Machines Corporation, Minnesota Mining & Manufacturing Corporation and Seagate Technology Corporation, amici curiae.

Barnes, Richardson & Colburn (Robert E. Burke, Christopher E. Pey, Mark T. Wasden and Cindy H. Chan) for Polaroid Corporation and Amoco Chemical Company, amici curiae.

Coudert Brothers (Steven H. Becker, Charles H. Critchlow and Claire R. Kelly) for Texaco Refining and Marketing Inc., American Natural Soda Ash Corp., United Export Corp., ABRO Industries, GSI Exim America, Inc., Vitol S.A., Inc., M-C International D/B/A McLane Group International L.P., Bridgestone/Firestone Inc., Dorland Management, Inc., FAI Trading Co., Star Enterprises, Inc., Vista Chemical Co., Champion International Corp., Champion Export Corp. and ISP Technologies, Inc., amici curiae.

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mens Solar Industries and Unisys Corporation, amici curiae.

JUDGES:

DiCarlo, Chief Judge, Restani, Judge, Musgrave, Judge.

OPINION BY:

DOMINICK L. DiCARLO

OPINION:

OPINION

DiCARLO, CHIEF JUDGE: Article I, Section 9, Clause 5 of the United States Constitution (the "Export Clause") provides "no Tax or Duty shall be laid on Articles exported from any State." The question presented is whether the Harbor Maintenance Tax, 26 U.S.C. §§ 4461-62 (1988 & Supp. V 1993) (Internal Revenue Code) [hereinafter "Tax"], when imposed upon merchandise exported from the United States, violates this prohibition. The court concludes that it does.

I

This case comes before the court on cross-motions for summary judgment pursuant to USCIT Rule 56. The parties agree there are no material facts in dispute. They also agree that the court has subject-matter jurisdiction to determine the constitutionality of the Tax.

Congress has given the Court of International Trade jurisdiction over matters arising out of the Tax: "For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2). This language directs that taxes imposed

upon both imports and exports shall be treated as if they were customs duties, in other words, as import transactions.

Congress's purpose in centralizing jurisdiction over import transactions in the Court of International Trade was to dispel the jurisdictional confusion existing as to the Court of International Trade's predecessor, the Customs Court, and to reflect the true scope of the court's jurisdiction. See H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758-59. As the legislative history of the Customs Courts Act of 1980 shows, Congress sought, by permitting a single court to hear these suits, "to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction." H.R. Rep. No. 1235, at 47, 1980 U.S.C.C.A.N. at 3759. Accordingly, Congress granted the court exclusive jurisdiction over any civil action against the United States arising out of federal laws governing import transactions, because of the court's "already developed expertise in international trade and tariff matters." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1586 (1994). This authority includes the inherent responsibility to review challenges to the constitutionality of a law within that area of expertise. See 28 U.S.C. §§ 251, 1331, 1585 (1988) (providing this court with all powers of U.S. district courts including original jurisdiction over actions arising under Constitution); see, e.g., 28 U.S.C. § 255(a)(1) (1988) (permitting designation of three-judge CIT panels to hear and determine constitutional issues). In addition to the statutory language, the legislative history of the Tax supports this court's jurisdiction. S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6715.

Finally, this is not the first case where the court has taken jurisdiction over matters arising from the Tax; the court recently exercised jurisdiction over claims for restitution of taxes paid by passenger liners pursuant to the Tax in *Carnival Cruise Lines, Inc. v. United States*, 18 C.I.T. 1020, 866 F. Supp. 1437

(1994). In sum, in light of the Tax's plain language, its legislative history and the Court of International Trade's traditional role as the proper forum for review of actions governing import transactions, the court possesses jurisdiction to hear and determine the constitutionality of the Tax.

II

Congress established the Tax as part of the Water Resources Development Act of 1986, Pub. L. No. 96-622, 100 Stat. 4082 (codified as amended in scattered titles of U.S.C.) [hereinafter the "Act"]. While it named the charge imposed upon port users a "tax," 26 U.S.C. ch. 36, subch. A, this nomenclature is not necessarily binding on the court, see *Fairbank v. United States*, 181 U.S. 283, 304, 45 L. Ed. 862, 21 S. Ct. 648 (1901) ("we must regard things rather than names"). The provisions of the Act, including the Tax, are severable. Water Resources Development Act § 949, 33 U.S.C. § 2304 (1988).

The Tax imposes an ad valorem tax on "any port use" of federally-maintained navigable waterways. 26 U.S.C. §§ 4461, 4462(a)(2). The statute defines "port use" as "the loading [and] unloading of commercial cargo [on or] from [] a commercial vessel at a port," 26 U.S.C. § 4462(a)(1), and "port" as any channel or harbor open to public navigation that is not an inland waterway, 26 U.S.C. § 4462(a)(2)(A). The Tax is applied against imports and exports, and domestic shipments, as well as passengers. 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A). Presently, the amount of the Tax imposed is 0.125 percent of the value of the commercial cargo involved. 26 U.S.C. § 4461(b) (Supp. V 1993). This is without regard to the size of the vessel, the manner or extent of use of port facilities, or the condition of the particular port. For passengers, the statute calculates value based on the actual charge paid for the transportation. See 26 U.S.C. § 4462 (a)(5)(B). Further, Congress does not distinguish among port users or particular ports in expending funds for harbor maintenance or operations, even though

some ports or users may contribute the majority of the fees paid.

The Tax exempts certain cargo and passengers from its burden. These exemptions include fish or other aquatic animals not previously landed on shore, ferry passengers, bunker fuel, ships' stores, or equipment necessary for operation of a vessel, bonded commercial cargo entering the United States for transhipment to a foreign country, and any cargo shipped between the continental United States and Alaska, Hawaii or any U.S. possession for ultimate consumption at its destination with the exception of crude oil transported from Alaska. 26 U.S.C. § 4462. The Tax also exempts intraport movement of cargo, recreational and de minimis port use, port use by the U.S. government, and humanitarian and development assistance cargo. *Id.* Congress's stated purpose in enacting the Tax was to have commercial shippers fund the maintenance of U.S. harbors and ports. See S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709; S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644.

In enacting the Tax, Congress concurrently established the Harbor Maintenance Trust Fund, 26 U.S.C. § 9505 (1988 & Supp. V 1993) [hereinafter "Trust Fund"], to carry out the purposes of the Act. Monies collected pursuant to the Tax are transferred to the Trust Fund for disbursal upon further appropriation by Congress in accordance with the Trust Fund's provisions. 26 U.S.C. § 9505(b), (c). Since 1991, Congress has authorized appropriations from the Trust Fund to offset up to 100 percent of the eligible operation and maintenance outlays for harbors under the Act. Water Resources Development Act of 1990 § 316, 33 U.S.C. § 2238 (Supp. V 1993). Congress did not limit expenditure of Tax revenues to the U.S. Army Corps of Engineers, the largest beneficiary of the Trust Fund. Rather, the Departments of the Treasury and Commerce, and the National Oceanic and Atmospheric Administration are also potential recipients of Tax revenues. 26 U.S.C. § 9505(c); see Office of Management and Budget, Executive Office of the President,

FY 1996: Budget of the U.S. Government, Appendix, 376, 802 (1995).

Despite the number of agencies eligible to receive funds, the Trust Fund has been running a yearly surplus since its inception. This surplus burgeoned with the increase in the Tax from 0.04% to 0.125%, (Br. of Amicus Amoco Chem. Co., Ex. A (Second Annual Report to the Congress on the Status of the Harbor Maintenance Trust Fund For Fiscal Year 1993 5 (1994))) [hereinafter "Second Annual Rep."], and is "on budget." The practice of listing trust fund revenues on budget permits them to be included in calculations of the federal budget deficit. Thus, any monies contributed by such funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit. See H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985) ("the increase in net budget receipts [provided by the Tax] will reduce the potential Federal budget deficit by a like amount by providing a new source of user-related revenues rather than relying completely on general fund appropriations"). As of 1994, the government had collected over 500 million dollars from exports alone. (See Br. of Amicus Polaroid Corp., Ex. A (First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund Fiscal Years 1987-1992 4 (1993))) [hereinfater "First Annual Rep."]; Second Annual Rep. at 3.

Plaintiff paid the Tax on articles exported for the period April 1 through June 30, 1994. It now sues for recovery of those monies, claiming imposition of the Tax violates the Export Clause.

III

An act of Congress is presumed to be constitutional. *Fairbank*, 181 U.S. at 285. Any excess in the exercise of legislative power or conflict with the restrictions imposed by the fundamental law should be clear before the court overturns an enactment of the legislature. *Id.* Yet, as Chief Justice Marshall expounded in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.

Ed. 60 (1803), "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Id.* at 180.

A.

Defendant contends that the Tax is a valid exercise of Congress's constitutional authority to regulate foreign and interstate commerce, and does not implicate its taxing powers. According to defendant, although the Export Clause restrains those powers, the Clause cannot circumscribe Congress's unlimited capacity to regulate commerce.

The court concludes the power to regulate commerce does not eclipse the Export Clause. Although Congress can adopt the methods it deems necessary to accomplish its goals pursuant to the regulation of commerce, this authority is limited by other provisions of the Constitution. *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624, 1627 (1995) (providing that commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L. Ed. 23 (1824)); *North Am. Co. v. S.E.C.*, 327 U.S. 686, 704-05, 90 L. Ed. 945, 66 S. Ct. 785 (1946) (noting Congress's commerce powers are limited by express provisions in other parts of Constitution); *Rodgers v. United States*, 138 F.2d 992, 994-95 (6th Cir. 1943). Accordingly, even if the court were to find the Tax to be a charge imposed under the commerce power, such a charge is still subject to the restrictions of the Export Clause if it in fact serves as a tax or duty. For example, a charge upon exports imposed under the Commerce Clause as a user fee, or to regulate commerce, would not be immune from the restrictions of the Export Clause if the court found the charge actually to be a tax or duty on exports. The court looks to substance over nomenclature.

The origin of the Export Clause indicates it is to have broad effect. Two amendments seeking to limit it were rejected. The first would have limited the Clause by adding "for the purpose of revenue" to the prohibition against taxes or duties on exports. II The Records of the Federal Convention of 1787 363 (Max Farrand ed., 1937). The second amendment would have permitted export taxes if approved by a two-thirds majority in both Houses of Congress. Note, *Constitutionality of Export Controls*, 76 Yale L.J. 200, 203 (1966). The Constitutional Convention deliberately chose to leave exports unburdened; and, in so doing, persuaded the South to join the new union. See *id.* at 204. For the Southern States, the Export Clause addressed concerns that a Congress controlled by the North would impose burdensome levies on southern exports. *International Business Machs. Corp. v. United States*, 59 F.3d 1234, 1236 (1995) [hereinafter "*IBM*"].

The Export Clause serves to keep all exportation free of any tax burden. *Fairbank*, 181 U.S. at 290. As the Court in *Fairbank* explained, "if all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation." *Id.* at 293.

B.

The court finds the Harbor Maintenance Tax as it applies to exports constitutes a tax prohibited by the Export Clause and does not fall under Congress's Commerce Clause powers. Defendant contends the Water Resources Development Act does not establish a tax upon exports in violation of the Export Clause, because enhancement of the general revenue is not its primary purpose, but is merely one aspect of a comprehensive legislative program providing for conservation and development of the nation's water resources infrastructure. According to defendant, the value of the benefit provided by the program, maintenance of safe and efficient ports and harbors, reasonably relates to the charges imposed and accrues, at least in part, to an

identifiable private beneficiary. In considering the Act as a whole, defendant contends Congress simply imposed a user fee "for the purpose of making effective the congressional enactment." (Def.'s Mem. in Opp'n to Amici at 54) (quoting *Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir. 1967)).

For defendant to succeed on this argument, the court must find that regulation is the primary purpose of the Tax, see *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983), cert. denied, 465 U.S. 1080, 79 L. Ed. 2d 764, 104 S. Ct. 1444 (1984), or alternatively, that Congress sought to raise money to recoup the costs of services provided to the payer pursuant to a regulatory scheme, see *Pace v. Burgess*, 92 U.S. 372, 375-76, 23 L. Ed. 657 (1876). The Tax serves neither purpose.

First, the Act neither discourages nor regulates use of a harbor; neither does it so intend. In Moon, the court upheld an export certificate program for wheat farmers. 379 F.2d at 391-93. It found the program's monetary imposition for overproduction, essentially a penalty for non-compliance with the Secretary of Agriculture's production controls, did not violate the Export Clause. *Id.* The court held where regulation is the primary purpose of the statute as a whole and revenue also is obtained incidentally through imposition of sanctions, the Constitution will not necessarily prohibit the charge. *Id.* at 391 (quoting *Rodgers*, 138 F.2d at 994). Here, the Act does not have regulation as its primary purpose. For example, it does not seek to control the amount or manner of port use. Further, the Act does not seek to influence commercial practices, or seek to enforce compliance with a legislative goal as did the Agricultural Adjustment Act of 1938, as amended by the Food and Agriculture Act of 1964, considered in *Moon,* or the Agricultural Act of 1949, as amended, considered in *Block.* Congress instead sought funding for the extensive maintenance projects envisioned under the Act. S. Rep. No. 126 at 7, 1986 U.S.C.C.A.N. at 6644 (noting Congress intended Harbor Maintenance Tax as

new tax to cover portion of Federal spending on harbor maintenance).

Second, there is little indication that Congress intended to establish a user fee. Rather, Congress found an alternative way to fund expenditures it intended to make. When Congress enacted the Tax, it intended to use the Tax to pay the costs of developing, operating, and maintaining port projects. H.R. Rep. No. 251, at 19; S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709. The Act permitted disbursement of Tax proceeds to the U.S. Army Corps of Engineers for recovery of up to 40 percent of its eligible operation and maintenance outlays. Water Resources Development Act of 1986 § 210(a)(2), 33 U.S.C. § 2238(a)(2) (1988); see First Annual Rep. at 1 (noting "federal expenditures for [port and harbor maintenance] were determined to be synonymous with expenditures made by the Army Corps of Engineers"). The Water Resources Development Act of 1990 increased the rate of the Tax and allowed the Corps of Engineers to recover up to 100 percent of its "eligible operations and maintenance costs." 33 U.S.C. § 2238(a)(2) (Supp. V 1993). Since its inception, the Trust Fund has accumulated significant surpluses. See 141 Cong. Rec. E519 (daily ed. Mar. 6, 1995) (statement of Rep. McDermott). Accordingly, we take note of the warning in *Moon*, "certainly if the record in any way indicated that substantial amounts of revenue had been generated by the sale of export certificates, we would hesitate before deeming the program an exercise of the commerce power." 379 F.2d at 392.

The court finds the primary purpose of the Tax is to raise revenue, as Congress has imposed "a duty under the pretext of fixing a fee," *Pace*, 92 U.S. at 376. For a charge to withstand constitutional challenge under the Export Clause, it must defray costs of services rendered pursuant to the regulation of commerce, and the taxes collected may not be excessive. In the *Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 595-96, 28 L. Ed. 798, 5 S. Ct. 247 (1884), the Supreme Court upheld a per capita charge on non-U.S. citizens arriving in the United

States by ship. The Court found the statute in question imposed the fee to defray costs appropriated in advance for inspection of immigrants before landing, and for their care and provision afterward. *Id.* at 590. The Secretary of the Treasury was to "distribute the fund in accordance with the purpose for which it was raised, not exceeding in any port the sum received from it." *Id.* As such, the charges imposed were incidental to the regulation of commerce and directly reimbursed the costs of services rendered to the individual.

Similarly, in *Pace*, the Supreme Court concluded that a fee for stamps used to distinguish tobacco intended for export - and thus to alleviate it from the heavy exactions placed upon tobacco sold domestically - was not a tax on exports. See 92 U.S. at 375-76; see also *Turpin v. Burgess*, 117 U.S. 504, 29 L. Ed. 988, 6 S. Ct. 835 (1886) (sustaining, on similar grounds, constitutionality of charge imposed to identify tobacco packages intended for export). Rather, the Court characterized the stamp as a fee "accruing in the due administration of the laws and regulations," serving simply as "compensation given for services properly rendered." *Pace*, 92 U.S. at 375. The Court found the payment for the services rendered, through identification of tobacco exported, was no different than "the fee for clearing the vessel in which [the tobacco] was transported, or for making out and certifying the manifest of the cargo." *Id.* The amount of the fee never exceeded the costs to produce the stamps and the cost of services necessary to give the exporter the benefit of the exemption from taxation; identification of the tobacco provided the exporter the direct benefit of a domestic tax exemption.

In contrast, little nexus binds the imposition of the ad valorem tax on cargo to the costs of port maintenance and regulation of shipping. As the exaction is tied to value and there is no mechanism to ensure that the fees collected will be used "only or primarily for the cost of" port maintenance associated with the shipping that is taxed, the Tax is not a user fee imposed under the commerce power. The fees collected, rather, yield funds for the purpose of maintaining and developing American ports and harbors for all uses,

American ports and harbors for all uses, commercial and recreational. Further, the Tax funds projects yet to be commenced, or even envisioned, rather than services already rendered. Application of the Tax has produced a substantial surplus in excess of the costs incurred. The court therefore finds the Tax raises revenue, and is not a user fee imposed pursuant to the regulation of commerce.

The Supreme Court recently has used another test to distinguish between an impermissible tax and a user fee. In *Massachusetts v. United States*, 435 U.S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978), the Court considered whether an aircraft registration fee levied on state police aircraft violated the judicially-implied intergovernmental tax immunity doctrine first set forth in *Collector v. Day*, 78 U.S. (11 Wall.) 113, 20 L. Ed. 122 (1871). In concluding that it did not, the Court relied on three criteria derived from *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972). To constitute a user fee, as contrasted with a tax, the Court held: (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. *Massachusetts*, 435 U.S. at 466-70.

The Tax fails classification as a user fee under the test presented in *Massachusetts*. Although the Export Clause clearly is designed "to protect constitutionally valued activity from undue burden" that could result from certain taxing measures, see *id.* at 462, the court need not decide the issue of whether the tax is discriminatory. Even assuming, arguendo, that the Tax is non-discriminatory, the court finds the Tax fails the remaining two prongs of the *Massachusetts* test.

First, the charge is not based upon some fair approximation of the cost of the benefits port users receive from harbor main-

tenance and development projects. Low value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters. Yet, the cost to the latter is greater than that to the former. Further, most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures. (See, e.g., Br. of Amicus Amoco Chem. Co., Ex. G (Army Corps of Engineers, Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports (1992)) (draft document) (noting of $78,711,000 estimated collected 1992 taxes on exports and imports from Port of Los Angeles, only expenditures). $162,000 returned in port operation and maintenance expenditures). Additionally, although only certain commercial users must pay the tax, they are not the sole users of the ports nor the only beneficiaries of the maintenance and development projects. Based on the foregoing, the court does not find the charge imposed under the Tax is based on a fair approximation of the costs of benefits received by port users.

Second, the charge is excessive in relation to the cost to the government. The Tax is used to fund projects yet to be commenced, or even envisioned, rather than to repay the government for services rendered. The Tax has produced a substantial surplus, that is rapidly expanding, in excess of costs incurred. Second Annual Rep. at 5.

In sum, the Tax neither seeks to regulate Commerce nor repay the costs of services rendered; moreover, the Tax fails the alternative test provided by *Massachusetts*. Accordingly, the Tax is subject to the prohibitions of the Export Clause.

C.

Defendant questions whether the Harbor Maintenance Tax is a tax levied upon "exported articles" within the meaning of the Export Clause. According to defendant, a tax or fee only violates the Export Clause if it is levied on goods by reason of their exportation, e.g., if such goods have entered the export stream. Defendant contends the broad prohibition of the earlier

cases against a tax upon goods having entered the export stream was curtailed by *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L. Ed. 2d 495, 96 S. Ct. 535 (1976), and further constrained in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978).

Further, according to defendant, imposition of the Tax upon loading of freight is merely intended to ensure that those who actually use the ports would pay. As such, the time when the Tax attaches has no other significance for purposes of assessment of the fee upon exports. The motivation behind imposing an ad valorem charge, defendant insists, was to minimize possible competitive disadvantages among cargo types and U.S. ports that would have arisen from a user charge.

In any case, defendant argues the *Michelin* and *Washington Stevedoring* tests now examine the nature of the tax at issue, rather than the status of the article. Those cases explored whether the taxes were upon "exports as such" and whether they offended the policies protected by the framers of the Constitution. Those policies, defendant argues, include promoting uniformity among the former colonies and preventing the North from crippling the export-dependent Southern States pursuant to the Import-Export Clause. U.S. Const. art. I, § 10, cl. 2 ("No States shall ... lay any Imposts or Duties on Imports or Exports ...."). Specifically, defendant contends *Michelin* established that a nondiscriminatory ad valorem property tax did not violate the Import-Export Clause simply because it applied to recently imported goods - there, tires maintained at a wholesale distribution warehouse. 423 U.S. at 286. Similarly, defendant contends *Washington Stevedoring* held that a nondiscriminatory local tax that compensates the state for services rendered also failed to implicate the concerns of the Import-Export Clause. 435 U.S. at 755.

Integral to these tests, defendant contends, is the court's examination of whether the charge discriminates in imposing its

burden. According to defendant, a nondiscriminatory charge for a service that facilitates export activity does not violate the Export Clause. Defendant maintains the Tax is such a charge. The court disagrees.

In examining whether the Tax burdens "exported articles," the court limits its inquiry to the Export Clause, for there is a distinct difference in language between the Import-Export Clause and the Export Clause. See *IBM*, 59 F.3d at 1238-39. The decisions in *Michelin* and *Washington Stevedoring* attached significance to the distinction between "Imposts and Duties," and the Export Clause's broader prohibition. See *Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759- 60. As the Supreme Court in *Michelin* noted, the Import-Export Clause only bans "Imposts or Duties" and is not "a broad prohibition of every 'tax.'" 423 U.S. at 290. According to the Federal Circuit, a difference in policy intended by the framers of the Constitution underlies the difference in language:

> While the Import-Export Clause was intended to prohibit States from imposing a 'transit fee' on goods moving in foreign commerce, the Export Clause served the broader purpose of 'forbidding federal taxation of exports.' The Supreme Court's current narrower view of the prohibition in the Import-Export Clause thus does not dictate that the Export Clause be given a similarly narrow construction.

IBM, 59 F.3d at 1239 (citations omitted). Defendant's citations of *Michelin* and *Washington Stevedoring* are, thus, inapplicable.

Moreover, even if this court were to assume *Michelin* and *Washington Stevedoring* apply to the Export Clause, the cases remain distinguishable. *Michelin* concerned imported tires that had already lost their identity as a unit and as an import after being unloaded and stored within a warehouse. See 423 U.S. at 280. At the warehouse, workers unloaded the containers in which the tires were shipped, sorted the tires by size and style, and stacked them on wooden pallets, without segregation by

place of manufacture. *Id.* The tires required no further processing to ready them for sale and delivery to franchised dealers. *Id.* In this sense, the Court found the warehouse operated "no differently than ... a distribution warehouse utilized by a wholesaler dealing solely in domestic goods." *Id.* at 302. Accordingly, the holding in *Michelin* turned on the fact that the goods were no longer in import transit. *Id.* at 286.

As distinguished from the unloaded and unpacked imports in *Michelin*, the cargo taxed in this case has entered the stream of exports. The cargo, as it is loaded on board the vessel, is in transit, and the Tax falls upon the merchandise itself. As such, it is an article protected by the Export Clause. *Michelin* is inapplicable.

In *Washington Stevedoring*, the Supreme Court upheld a business and occupation tax imposed by the State of Washington upon the value of certain services rendered - the loading and unloading of cargo. *Id.* at 737, 758. The Court distinguished the stevedoring services from maritime insurance policies covering such goods. *Id.* at 756 n. 21. The Court found placing a tax upon the insurance policies was more suspect, and likely unconstitutional as a violation of the Import-Export Clause, because "the value of goods [bore] a much closer relation to the value of insurance policies on [those goods] than to the value of loading and unloading ships." *Id.* As the amount of the Tax ad valorem is tied directly to the value of the goods, *Washington Stevedoring* is equally inapplicable.

Two distinct tests have evolved from case law for determining whether the Export Clause will immunize an article from taxation. First, the court must examine the immediacy of exportation. Second, the court considers the proximity of the tax imposed to the value of the articles exported. Here, neither test supports the constitutionality of the Tax.

In delineating a zone where an article in the stream of commerce melds into the export stream, the court looks to see whether the article is in the actual process of exportation, and

whether it "has begun its voyage or its preparation for the voyage." *Cornell v. Coyne*, 192 U.S. 418, 428, 48 L. Ed. 504, 24 S. Ct. 383 (1904). For instance, where exported articles were delivered to the carrier and title passed, the Supreme Court found those articles had entered the process of exportation. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 68-70, 67 L. Ed. 865, 43 S. Ct. 485 (1923). Thus, taxing such articles would have been unconstitutional. Although other actions may have been necessary before the goods would have been in transit, "so long as [these actions] were only the regular steps" taken to export such goods, the effect of the sale was to start the goods upon their voyage abroad. See *id.* at 69-70.

Constitutional freedom from the taxation of exports involves more than mere exemption from taxes laid directly upon the articles exported. In *Fairbank*, the Court held that a stamp tax imposed on a foreign bill of lading was equivalent to a tax upon the articles listed, and therefore contrary to the *Export Clause*. 181 U.S. at 312. The Court noted exports almost always require bills of lading. See *id.* at 294 (citing *Almy v. California*, 65 U.S. (24 How.) 169, 174, 16 L. Ed. 644 (1861) (noting necessities of foreign commerce always require association with bill of lading, the Court reasoned, Congress had violated the letter and spirit of the Export Clause.) See *id.* at 290-291, 300, 312.

Similarly, in *Thames & Mersey Marine Insurance Co. v. United States*, 237 U.S. 19, 59 L. Ed. 821, 35 S. Ct. 496 (1915), the Supreme Court found a tax upon policies of marine insurance on exports prohibited by the Constitution. In reaching its determination, the Court inquired whether the tax imposed was so directly and closely related to the process of exportation that the tax was in substance a tax upon the exports themselves. *Id.* at 25. The Court found its answer within the dynamics of trade and commerce: where commerce requires an item for exportation - such as a written instrument necessarily and always associated with the export of articles of commerce - taxation of that item serves as taxation of the exported article. *Id.* at 26-27.

This prohibition of the Export Clause also has been applied to taxes upon charter parties, contracts for the carriage of full cargo lots, *United States v. Hvoslef*, 237 U.S. 1, 16-17, 59 L. Ed. 813, 35 S. Ct. 459 (1915) and, more recently, to excise taxes on premiums paid to foreign insurers, *IBM*, 13 Fed. Cir. (T), 59 F.3d 1234.

Here, Congress imposed the Tax directly upon exports well along the stream of exportation. The Tax is assessed at the time of loading the cargo. 26 U.S.C. § 4461(c)(2). As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, see *A.G. Spalding*, 262 U.S. at 68-70, a tax imposed on the further step of loading such cargo onto the vessel also falls within the prohibition of the Clause.

The Tax is assessed ad valorem directly upon the value of the cargo itself, not upon any services rendered for the cargo, or upon any instruments of commerce that accompany the goods. Further, an ad valorem tax is levied in direct proportion to an article's value. Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.

Accordingly, the court concludes the Tax is prohibited by the Export Clause and it need not address amici's (claimants in other cases) contentions pertaining to whether the Tax also violates the Due Process Clause or the Port Preference Clause of the Constitution.

IV

As indicated, the parties agree that this court has subject matter jurisdiction, see supra p. 3, but disagree as to the specific basis upon which exporters may make claims. Two subsections of the court's jurisdictional statute may provide the parties a route for judicial review. See 28 U.S.C. § 1581(a), (i) (1988 & Supp. V 1993). Subsection 1581(a) provides for review of a denial by the Customs Service of a protest of certain duties, charges, exactions, or drawbacks. 28 U.S.C. § 1581(a); 19

U.S.C. § 1515 (1988 & Supp. V 1993). A party must protest a Customs decision within 90 days of the date of the decision to be protested. 19 U.S.C. § 1514(c)(3)(B) (Supp. V 1993). On the other hand, subsection 1581(i) gives the court broad residual authority over civil actions arising out of federal statutes governing import transactions. Conoco, 12 Fed. Cir., 18 F.3d at 1586. Subsection 2636(i) of the same title requires a party to commence an action under subsection 1581(i) "within two years after the cause of action first accrues." 28 U.S.C. § 2636(i) (Supp. V 1993). The court's decision as to the appropriate jurisdictional basis relates to the amount of plaintiff's recovery.

A.

Defendant argues jurisdiction is only proper under subsection 1581(a). According to defendant, the court may review challenges to the constitutionality of the Tax only where an exporter properly protests its payment, and seeks review of the denial of that protest. Although defendant concedes that "neither jurisdictional provision may fit exactly," (Tr. of Oral Argument at 24 (June 27, 1995)) [hereinafter "Tr."], defendant contends permitting this case to rest upon any other jurisdictional ground would greatly expand the government's liability and would disregard the only congressionally-mandated avenue to challenge the Tax.

According to defendant, Congress intended this Court to entertain a tax challenge only after an exporter had protested its payment of the tax. Defendant garners support for this interpretation from the statutory language directing the court to treat the tax as a customs duty for the purpose of jurisdiction. If the court properly is to treat the tax as a customs duty, defendant contends, the protest procedures under subsection 1581(a) must govern.

Further, defendant argues, there is a Customs decision for the parties to protest - Customs' decision to accept payment. (Tr. at 25.) Defendant contends administration of the Tax is not

merely ministerial, because subsection 4462(i), title 26, United States Code authorizes Customs, through the Department of the Treasury, with administering the assessment of the Tax. Defendant claims Congress has delegated substantial authority to the Secretary of the Treasury (1) to determine the method of payment and collection of the Tax; (2) to exempt certain transactions from the Tax where collection would be impracticable; and (3) to provide for mitigation of penalties and the settlement of claims. Defendant claims this grant of power gives the Secretary of the Treasury "near plenary authority to 'carry out the purposes' of the Act. "(Def.'s Mem. in Opp'n to Amici at 34.) Accordingly, defendant contends, Customs' power to administer the Tax transcends a ministerial role.

Defendant cites a number of authorities in support of its position. In *Norfolk & Western Railway Co. v. United States*, 18 C.I.T. 55, 843 F. Supp. 728 (1994), defendant asserts the court found the assessment of a user fee similar to the Tax constituted a protestable decision, and the period for filing the protest began when Customs decided the plaintiff would have had to pay the fee. In *General Motors Corp. v. United States*, 10 C.I.T. 569, 643 F. Supp. 1139 (1986), defendant contends the court held administrative procedures, where available, had to be exhausted even before Customs issued its decision. According to the defendant, although the court found the obligation to pay the charges was derived from statute, payment of the duties was pursuant to section 1514, and therefore protestable. The fact that Customs took no affirmative action to collect the duties but only accepted or rejected certain offers, defendant argues, did not alleviate the need for protest.

These arguments are unpersuasive. Section 1581(a) permits review of protest denials by Customs for only certain final decisions enumerated in 19 U.S.C. § 1514(a). See 28 U.S.C. § 1581(a); 19 U.S.C. § 1515. For a party to be able to protest and obtain jurisdiction pursuant to section 1581(a), Customs first must have made a decision. See 19 U.S.C. § 1514(a), (c) (1988 & Supp. V 1993) (noting Customs decisions are final unless

protested and that such protests must "set forth distinctly and specifically" each decision protested).

Acceptance of payment of duties owed does not constitute a protestable decision. See *Dart Export Corp. v. United States*, 43 C.C.P.A. 64, 74, C.A.D. 610 (holding Customs' acceptance of estimated duties tendered did not constitute decision), cert. denied, 352 U.S. 824, 1 L. Ed. 2d 48, 77 S. Ct. 33 (1956); *Best Foods, Inc. v. United States*, 37 Cust. Ct. 1, 9-10, 147 F. Supp. 749, 756-57 (1956) (holding payment of customs duties at time of entry not decision for purpose of computing time to file protest). Customs plays little role in accepting the payments; rather, they arrive at a "postal rental box serviced by a commercial bank that processes [Harbor Maintenance Fund] payments and deposits them to the United States Treasury." United States General Accounting Office, U.S. Customs Service: Limitations in Collecting Harbor Maintenance Fees, GAO/GGD-92-25, at 5 (Dec. 1991). As recognized by this court in *Carnival*, it would be impossible to protest the Tax as "there was no decision of Customs which [plaintiffs] could protest." 866 F. Supp. at 1441.

Neither the Harbor Maintenance Tax statute, nor its regulations, require a decision from Customs. As previously noted, the statute imposes a Tax on commercial cargo at loading for exports and unloading for imports. 26 U.S.C. § 4461(c)(2). Liability is an ad valorem percentage of the cargo value. 26 U.S.C. § 4461(b) (Supp. V 1993). Value is determined by standard commercial documentation. 26 U.S.C. § 4462(a)(5)(A). Thus Congress, and not Customs, has set the time of imposition and the amount of the Tax. The regulations require exporters to pay port "use fees" on a quarterly basis and mail their payment with a quarterly summary report or cover letter identifying the exporter to Customs' post office box in Chicago. 19 C.F.R. § 24.24(e) (1995). Exporters may request refunds by mailing an amended quarterly summary report with a copy of the quarterly summary report for the quarter(s) in which they request a refund to the Chicago post office box, *id.*, or alternatively by fil-

ing with Customs Headquarters through general provisions for claims not otherwise provided for by the regulations, 19 C.F.R. § 24.73 (1995). None of these procedures requires Customs to judge the constitutionality of the Tax, and cannot be considered decisions with respect to payment. These actions are merely ministerial in nature. Although there may be circumstances where Customs might exercise discretion in administering and enforcing the Tax, this discretion does not extend to a determination on the constitutionality of the Tax.

In this case, there are no issues of classification or similar issues which would be part of a protestable decision. In *Mitsubishi Electronics America, Inc. v. United States*, 12 Fed. Cir., 44 F.3d 973, 976 (1994), the Federal Circuit held Customs does not make protestable decisions concerning antidumping duties under 19 U.S.C. § 1514(a). The Court of Appeals emphasized that Customs only performed a ministerial function in collecting such duties under the direction of the Department of Commerce, and Customs did not conduct an investigation, determine rates and margins, or issue antidumping orders. 44 F.3d at 977. Plaintiff and amici do not argue that they have overpaid the amount of the Tax; rather, their challenge goes to the heart of the constitutionality of the statute itself, a matter outside of Customs' authority. See generally *McCarthy v. Madigan*, 503 U.S. 140, 147-48, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992) (noting agency may be unable to consider whether relief should be granted, because of lack of institutional competence to resolve issues presented). Similarly, in *United States Cane Sugar Refiners' Ass'n v. Block*, 3 C.I.T. 196, 201, 544 F. Supp. 883, 887, aff'd, 69 C.C.P.A. 172, 683 F.2d 399 (1982), in which protest was not required, Customs could not change the scope of the Presidential Proclamation as to over-quota sugar. Much like *Mitsubishi* and *Cane Sugar Refiners'*, there is no decision by Customs as to whether it will assess the Tax.

Customs does not determine the application, policies, or rates of the Tax, but merely serves to implement its provisions. As distinguished from *National Corn Growers Ass'n v. Baker*,

6 Fed. Cir. 70, 840 F.2d 1547 (1988), where the policies and rates in question were those of Customs, and "peculiarly within the ambit of the Customs Service to correct," 6 Fed. Cir. (T) at 82, 840 F.2d at 1556, Customs is powerless to correct the constitutional infirmities raised by plaintiff. See *Califano v. Sanders*, 430 U.S. 99, 109, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977) (finding administrative hearing procedures unsuited to resolving constitutional issues). In short, Customs must simply follow the path enacted by Congress.

Moreover, neither of defendant's proffered cases, *Norfolk* nor *General Motors*, supports its position. The protestable decision in *Norfolk* - an assessment of a user fee - is distinguishable from the present case. In *Norfolk*, the protestable decision was Customs' particular application of a statute. 843 F. Supp. at 733. Customs' decision was limited to whether a vessel constituted a ferry or a barge, not whether the application of the user fee was constitutional.

General Motors is equally inapposite. The issue concerned whether car radio components imported into the United States as original motor-vehicle equipment were diverted for other uses, and therefore subject to penalty. 10 C.I.T. at 570, 643 F. Supp. at 1139-40. Defendant argues the court found "payment [of duties] equated to the protestable event," even though the duty to pay was derived from statute, and not a Customs decision. (Def.'s Br. in Opp'n to Amici at 32.) This argument is misplaced. Plaintiff only paid the diversion duties "once Customs indicated to plaintiff that it considered the merchandise diverted." 10 C.I.T. at 575, 643 F. Supp. at 1143 (emphasis added). Customs made a decision in finding General Motors had diverted the radios. Again, Customs did not consider the constitutionality of the statutory scheme as a whole.

Defendant's own arguments support Customs' inability to make a decision as to the constitutionality of the Tax. Defendant initially argues, "the decision requiring the payment is the law itself, the compulsion to pay is provided by the statute it-

self. The decision is the decision to accept payment from the exporter." (Tr. at 26.) Defendant subsequently qualifies this statement, noting, "it isn't a decision by Customs to accept and retain the money, it has no authority to return it unless the proper procedures have been followed, which are filing of a protest and a denial of a protest." *Id.* at 59. Such reasoning is circular. For plaintiffs to file a valid protest, Customs must have made a protestable decision. As a decision, according to the defendant, can only be made after the protest is filed, no protestable decision exists.

Finally, certain amici contend the denial of a refund request pursuant to 19 C.F.R. § 24.24(e)(5) is a protestable decision, and that subsection 1581(a) would provide the appropriate basis for jurisdiction. Although Customs has discretion to decide whether it is able to refund payments of the Tax, such discretion is limited and does not extend to determinations of constitutionality. As Customs does not have the power to decide the constitutionality of the Tax, the court finds protestable decisions pursuant to the refund provision of subsection 24.24(e)(5) are limited to decisions pertaining to the administration of the Tax, not its constitutionality.

Subsection 1581(i) embraces the issues contested as to the Harbor Maintenance Tax. It provides, in pertinent part,

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for--
>
> (1) revenue from imports or tonnage;

(4) administration and enforcement with respect to the matters referred to in paragraph (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(i). Congress directed the Tax be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within subsection 1581(i)(1).

Congress similarly intended the administration and enforcement of the Tax to be treated as the administration and enforcement of a customs duty. 26 U.S.C. § 4462(f)(1). Thus, jurisdiction lies under subsection 1581(i)(4) as it relates to subsection 1581(i)(1).

In sum, jurisdiction is provided by 28 U.S.C. § 1581(i).

V

The court finds the Harbor Maintenance Tax, as it applies to exports unconstitutional. Plaintiff's motion for summary judgment is granted, defendant's cross-motion for summary judgment is denied. Parties are to submit a proposed judgment in conformity with the opinion within 20 days.

DOMINICK L. DiCARLO

Chief Judge

JANE A. RESTANI

Judge

R. KENTON MUSGRAVE

Judge

Dated: October 25th, 1995
New York, New York

CONCUR BY:
MUSGRAVE

CONCUR:

Judge **MUSGRAVE**, concurring.

I concur in the opinion that the Harbor Maintenance Revenue Act (the "Act") is unconstitutional as it applies to exports and that the plaintiff U.S. Shoe is entitled to the remedy it requests, namely a refund of export taxes going back two years from the time it filed its complaint. Nevertheless, I offer some additional comments addressing the jurisdictional issue and the prayers of certain amici for a full refund of all taxes illegally collected from them since the implementation of the Act.[1] In my view, the manifestly inadequate administrative protest procedure under 28 U.S.C. § 1581(a) is a further reason that 28 U.S.C. § 1581(i) jurisdiction arises; moreover, complainants are entitled to a restitution of all taxes heretofore exacted under the Act in violation of the Export Clause of the United States Constitution.[2] This latter position is compelled by the Fifth Amendment Due Process Clause enjoining the deprivation of "life, liberty, or property, without due process of law."

I

As an initial matter, recent opinions of the Court of Appeals for the Federal Circuit and this Court have ruled unambiguously that a decision by the Customs Service ("Customs") is a condition precedent for section 1581(a) jurisdiction to arise.

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[1] E.g., "Amici respectfully join in plaintiff's request that this Court find the HMT unconstitutional, strike it down, and direct pursuant to the power granted it under 28 U.S.C. § 1585 that all HMT payments unlawfully collected be refunded, together with such other and further relief as may be appropriate." (Amici Texaco et al.'s Mem. Supp. Summ. J. at 2) (emphasis added).

[2] The other jurists on this panel are not in accord with the comments addressing the remedy issue.

Mitsubishi Electronics of America, Inc. v. U.S., 44 F.3d 973 (Fed. Cir. 1994); *Carnival Cruise Lines v. U.S.*, 18 C.I.T. 1020, 866 F. Supp. 1437 (1994). As the Court's opinion makes abundantly clear, there is no decision involved in Customs' collection of these unconstitutional taxes because Customs lacks discretion in the performance of its delegated ministerial duties. In addition to this reason, however, there is a further justification for the Court to invoke its section 1581(i) jurisdiction in this case: requiring plaintiffs to pursue a remedy under the protest procedures mandated by section 1581(a) would oblige them to follow a manifestly inadequate and utterly futile procedure.

Certain amici argue that a party could presumably request a refund as set forth in 19 C.F.R. §§ 24.24(e)(5) or 24.73, obtain a denial of refund from Customs, and then protest that decision of Customs to deny the refund by way of the administrative protest process prescribed by 19 U.S.C. §§ 1514 and 1515. According to these amici, the Court could dismiss as not ripe for adjudication those actions which were filed prior to Customs denying a refund request, but instead should waive exhaustion of administrative remedial procedures and assert jurisdiction under section 1581(i), as such procedures are inadequate for the type of relief sought. (Br. of Amici Curiae Aris-Isotoner, et al., at 14-22.) Plaintiff and nearly all amici argue that the available administrative protest remedy set forth in 19 U.S.C. §§ 1514 and 1515 is futile and manifestly inadequate under the circumstances. The ultimate issue presented by such arguments is whether administrative remedies set forth by statute and regulations are appropriate when a party seeks a refund of payments mandated by an act of Congress by challenging such act as unconstitutional.

The administrative remedial procedure as it applies to refund requests is clearly not meaningful or adequate under the given circumstances. See generally *McCarthy v. Madigan*, 503 U.S. 140, 144-149, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992) (explaining circumstances in which administrative remedies need not be exhausted); and *Conoco v. Foreign Trade Zones*

Board, 18 F.3d 1581 (Fed. Cir. 1994) (holding section 1581(a) jurisdiction inappropriate where it is futile or manifestly inadequate). Most importantly, as the Court's opinion makes clear, Customs does not have authority to refund Tax payments or otherwise grant effective relief for constitutional claims. It is well settled that an administrative agency lacks the authority to declare an act of Congress unconstitutional. See *Califano v. Sanders*, 430 U.S. 99, 109, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Hence, under the circumstances of this case Customs is compelled to deny any administrative refund claim, making a request for refund a futile act.

Moreover, Customs has predetermined the issue before it. As plaintiff points out, Customs' denial of protests challenging the constitutionality of the Harbor Maintenance Tax (26 U.S.C. §§ 4461 and 4462, hereinafter the "Tax") is a foregone conclusion. (Pl.'s Mem. Supp. Summ. J. at 15-16.) Customs routinely denies all of the protests it receives in connection with Tax payments. The denial is a form letter simply asserting in one sentence that the levy is not an unconstitutional tax but a statutorily mandated user fee.[3] Such routine denial demonstrates that filing refund requests with Customs on grounds of unconstitutionality is clearly a futile act.

Lastly, requiring a party to file for refunds may unduly prejudice that party. "Prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action." *McCarthy*, 503 U.S. at 147. The administrative refund processes set forth under 19 C.F.R. §§ 24.24(e)(5) and 24.73 do not provide a time frame for the resolution of a claim for refund. This Court has recently deemed it appropriate to waive

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[3] Declaration of Charles Davies, Director - User Fee Task Force, Headquarters Office of Inspection and Control at 6, and attachments.

exhaustion of administrative remedies because they were not clearly delineated and because they set up indefinite timetables. *B-West Imports v. United States*, 19 C.I.T., 880 F. Supp. 853, Slip Op. 95-28 (Feb. 24, 1995). The administrative refund procedures are similarly indefinite and are therefore inadequate under the circumstances of the present case.

Before this Court may exercise jurisdiction over this matter by way of section 1581(i), there must be terms within the language of that section which cover the issues plaintiff brings before the Court. *Conoco*, 18 F.3d at 1588-89. Defendant argues that section 1581(i) by its own terms fails to provide a jurisdictional basis for a constitutional challenge to the Tax because plaintiff's claims are based upon payments associated with exports, while the express terms of subsections 1581(i)(1) and (2) apply only to imports. (Def.'s Mem. Supp. Summ. J. at 24.)

The terms of section 1581(i) make clear that the Court has jurisdiction over any civil action that arises out of any United States law providing for the matters set forth in the statute. Defendant's reading of section 1581(i) would eliminate that all-encompassing term and in effect grant the Court jurisdiction only over the specific matters set forth in subsections 1581(i)(1)-(4), but not the laws dealing with those matters. Such an interpretation would mean that this Court would have jurisdiction over the Tax as it applies to imports, the district courts would have jurisdiction over the Tax as it applies to exports, and it is uncertain as to which court would have jurisdiction over the Tax as it applies to, e.g., passenger services.

As the opinion of the Court points out, Congress did not intend for the district courts to exercise jurisdiction over the Tax. The statutory language of 26 U.S.C. § 4462(f)(2) and its accompanying legislative history indicate Congress' clearly stated intention that this Court have jurisdiction over the Tax. Furthermore, "Section 1581(i) was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions and

to eliminate the confusion over whether jurisdiction lay in the Court of International Trade or the district courts." *Conoco*, 18 F.3d at 1588 (emphasis added). Thus it was the intent of Congress for this Court to exercise jurisdiction over the entire Tax, not just those portions of the Tax that are covered under the specific subsections 1581(i)(1)-(4).

The terms of section 1581(i) embrace the Tax. This Court has found that the Tax is a law which provides for revenues from imports and exports, and for the administration and enforcement with respect to those revenues including the protest process. Therefore, subsections 1581(i)(1) and (4) provide this Court with jurisdiction over the Tax.

In sum, Customs has not made a decision with respect to the Tax upon which a valid or meaningful protest may be predicated. Defendant's arguments simply ignore that necessary prerequisite to the protest process set forth under 19 U.S.C. §§ 1514 and 1515. Moreover, under the circumstances of this case, it is futile and manifestly inadequate to await a decision by Customs with respect to an administrative refund request. As required, the terms of section 1581(i) cover the issues that plaintiff brings before the Court. The Court's jurisdiction is therefore properly asserted over this matter by way of section 1581(i). The Court is authorized by statute to exercise discretion in requiring exhaustion of administrative remedies. 28 U.S.C. § 2637(d). Having found jurisdiction under section 1581(i), pursuant to this Court's discretionary powers under 28 U.S.C. § 2637(d), and for the reasons previously discussed, it is inappropriate to require exhaustion of any administrative remedy when, as in this case, a party requests a refund by challenging the constitutionality of an act under which payment was made.

II.

It is the duty of this Court to exercise judicial review over Congressional acts within its jurisdiction, and "should Congress, in the execution of its powers, adopt measures which are

prohibited by the Constitution ... it would become the painful duty of this tribunal ... to say, that such an act was not the law of the land." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423, 4 L. Ed. 579 (1819). As the opinion of the Court details, there is no question that the Act violates the Export Clause. Insofar as the Act therefore is not the law of the land, it is void ab initio: "an invalid exercise of the power of Congress ... [is] as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity ...." *Chicago, I. & L. R. Co. v. Hackett*, 228 U.S. 559, 566, 57 L. Ed. 966, 33 S. Ct. 581 (1913). When the invalid act is the federal government's unconstitutional exaction of taxes, taxpayers' rights under the Due Process Clause of the Fifth Amendment are implicated. "Thus, if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 131 L. Ed. 2d 820, 115 S. Ct. 1745, 1752 (1995) (Scalia, J., concurring).

A tax refund is the only appropriate remedy for the government's illegal collection of revenue under the Act. Because the tax violates the Export Clause, it was "beyond the [government's] power to impose, ... [and the government has] no choice but to undo the unlawful deprivation by refunding the tax previously paid under duress, because allowing the [government] to collect these taxes by coercive means and not incur any obligation to pay them back ... would be in contravention of the [Due Process Clause]." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 39, 110 L. Ed. 2d 17, 110 S. Ct. 2238 *(1990)*. Yet an attempt to collect all moneys illegally exacted since the tax's incipience in 1987 ostensibly conflicts with the two-year statute of limitations applicable generally to claims brought under 28 U.S.C. § 1581(i). Due to the peculiar circumstances of this case, however, enforcing the statute of limita-

tions would impermissibly infringe constitutional rights guaranteed under the Fifth Amendment Due Process Clause.

The United States Supreme Court has held that "[a] constitutional claim can become time-barred just as any other claim can. ... Nothing in the Constitution requires otherwise." *Block v. North Dakota*, 461 U.S. 273, 292, 75 L. Ed. 2d 840, 103 S. Ct. 1811 (1983). While valid claims based upon unconstitutional acts by the federal government may at some time become stale or deemed waived, an attempt, as here, at interposing a very short statute of limitations runs afoul of due process and flaunts the sovereign's role as, among other things, protector of rights of its citizens, from whom this government, almost uniquely when it was created, acquired all of its powers. And here, the legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act; this being true, enforcing the foreshortened statute of limitations is to reward the perpetration of an overtly unconstitutional action.

The Bill of Rights incorporates those indefeasible rights which the citizens decline to surrender to the sovereign, and it is this very feature of our constitutional democracy -- that the government is empowered only to the extent that citizens surrender their rights -- which distinguishes it from other political systems in which people derive their rights only from the state. Although the federal government enjoys broad immunity, this immunity does not extend to unconstitutional behavior, and a statute of limitations that operates in violation of the Due Process Clause constitutes an invalid exercise of the power of Congress which does not immunize the government from suit. [4]

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[4] See Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1427 (1987) ("Whenever a government entity transgresses the limits of its delegation [of powers] by acting ultra vires, it ceases to act in the name of the sovereign, and surrenders any derivative "sovereign" immunity it might otherwise possess.").

The exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation. [5]

Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948). "To hold otherwise would be to create the possibility that Congress could act unconstitutionally and then attempt to shield its action from review by virtue of sovereign immunity." *Bartlett v. Bowen*, 259 U.S. App. D.C. 391, 816 F.2d 695, 708 (D.C. Cir. 1987). Thus, it is to no avail that the interlocutor points to the jurisdictional nature of the statute of limitations presently under consideration. Moreover, "The courts ... have recognized a principle that the constitutional guarantee of an independent judiciary limits the legislature in the exercise of its power to regulate court jurisdiction." *Bartlett*, 816 F.2d at 705. The judicial branch must not countenance the disenfranchisement of democratic constitutional rights in deference to the royal cloak of sovereign immunity. To do so would be to abrogate the judiciary's proper role as protector and final arbiter of constitutional rights, a role implicit in the separation of powers established by our constitutional scheme and made deci-

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[5]See also *International Tel. & Tel. Corp. v. Alexander*, 396 F. Supp. 1150, 1163 n.31 (D. Del. 1975) (discussing federal tax protest and remedy statutes and declaring, "As previously noted, both statutes are jurisdictional and are within the power of Congress to enact pursuant either to Art. III, § 1 of the Constitution or the sovereign immunity of the federal government. ... These respective sources of power, however, cannot be utilized by Congress to shield from judicial review governmental action violative of constitutional guarantees.").

sively explicit in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

The Supreme Court has recognized that procedural requirements in tax refund cases must satisfy all the provisions of the Constitution. Discussing procedural obstacles which might bar a refund of state taxes collected in violation of the Constitution, the Court declared, "Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim." *Hyde*, 115 S. Ct. at 1750 (emphasis added). In this vein the Court has indicated that states may enforce "relatively short statutes of limitation applicable to such actions." *McKesson*, 496 U.S. at 45 (citing Florida's three-year statute of limitations for tax refund suits). Although states may promulgate statutes of limitations in connection with tax refund statutes, they are bound to provide substantive relief for revenue exacted in violation of the Constitution. A state's post-deprivation tax refund regime must afford "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40 (quoting *Atchison, T. & S. F. R. Co. v. O'Connor*, 223 U.S. 280, 285, 56 L. Ed. 436, 32 S. Ct. 216 (1912)). Moreover, when a state places taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. 496 U.S. at 31.

In tax refund cases the Fifth Amendment Due Process Clause does not endow the federal government with the flexibility the states enjoy when fashioning schemes to redress unconstitutional exactions. The relevant state obligations under the Fourteenth Amendment Due Process Clause owe their flexible nature to principles of federalism and comity:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. ... This Court [has repeatedly] shown an aversion to federal interference with state tax administration. ... The reluctance to interfere in state tax collection continued in *McKesson*, in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation.

National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582, 132 L. Ed. 2d 509, 115 S. Ct. 2351, 2354 (1995) (citation omitted). In the instant case, there exists no question of "comity" between the federal government and a state, and under *McKesson* and its progeny, a two-year statute of limitations in tax refund cases may well be unconstitutional at the state level. Although there is no precedent directly on point, it is evident that in this case, the more stringent due process obligations incumbent on the federal government entail that enforcing the two-year statute of limitations would infringe Fifth Amendment rights by, inter alia, failing "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."

There is no need to speculate on a constitutionally permissible term for a statute of limitations in this type of case. Having found the statute of limitations inapplicable, it is my opinion that the imperatives of due process require a full refund back to the date of the Act's implementation, i.e., 1987 (the bulk of unconstitutional exactions appear to have occurred subsequent to the increase of the tax from .04% to .125%, in 1991). Although the government has a legitimate interest in orderly and predictable tax administration, Justice O'Connor explained that "*McKesson* makes plain that equitable considerations are of limited significance once a constitutional violation is found." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 184, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (1990). Any misplaced concern for visiting hardship upon the government by requiring

a complete refund of the unconstitutionally exacted taxes is dispelled by the fact that at the end of fiscal year 1994, the fund generated by the Act contained a $ 453 million surplus,[6] while the total sums collected since the Act's inception amounted to $ 2.7 billion, $ 700 million of which was derived from unconstitutional export taxes. (Def's. Mem. Supp. Summ. J. at 5). Furthermore, the fund's cumulative surplus is expected to balloon to nearly $ 1.7 billion by the end of fiscal year 1999.[7] Under the circumstances, restitution of all unconstitutional exactions collected since the Act's implementation is appropriate where such relief is requested.

R. KENTON MUSGRAVE

Judge

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[6] Dept. of the Treasury, Financial Management Service, Funds Account Branch, Harbor Maintenance Trust Fund Income Statement and Balance Sheet, 10/1/93-9/30/94.

[7] Army Corps of Engineers Internal Briefing Outline (Feb. 2, 1995).

UNITED STATES SHOE CORPORATION,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

Court No. 94-11-00668

UNITED STATES COURT
OF INTERNATIONAL TRADE

19 C.I.T. 1413; 924 F. Supp. 1191;
1995 Ct. Intl. Trade
LEXIS 247; SLIP OP. 95-197

December 4, 1995, Decided

JUDGES:

BEFORE: THE HONORABLE DOMINICK L. DiCARLO, CHIEF JUDGE, AND JANE A. RESTANI and R. KENTON MUSGRAVE, JUDGES.

OPINION BY:

Dominick L. DiCarlo; Jane A. Restani; R. Kenton Musgrave

JUDGMENT

Upon consideration of plaintiff's and defendant's motions for summary judgment, pursuant to Rule 56 of the Rules of this Court, the submissions of amici, the record, and other pertinent papers, it is hereby

ORDERED that plaintiff's motion for summary judgment is GRANTED; and it is further

ORDERED that defendant's motion for summary judgment is DENIED; and it is further

ORDERED that the Harbor Maintenance Tax imposed, pursuant to the Harbor Maintenance Revenue Act of 1986, Pub. L. No. 99-662, 100 Stat. 4266, on merchandise exported from the United States be, and hereby is, declared to be unconstitutional as a violation of Article I, Section 9, Clause 5 of the United States Constitution; and it is further

ORDERED that the United States Customs Service is hereby enjoined, as of the date of the entry of this Judgment, from the assessment and collection of the Harbor Maintenance Tax in connection with merchandise exported from the United States; and it is further

ORDERED that a money judgment is awarded plaintiff in the amount of $ 8,281.87, together with interest and costs as provided by law.

Dominick L. DiCarlo, Chief Judge

Jane A. Restani, Judge

R. Kenton Musgrave, Judge

Dated: New York, New York, This 4th day of December, 1995.

UNITED STATES SHOE CORP.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Court No. 94-11-00668

UNITED STATES COURT
OF INTERNATIONAL TRADE

19 C.I.T. 1419; 924 F. Supp. 1191; 1995 Ct. Intl. Trade LEXIS 248; SLIP OP. 95-199

December 4, 1995, Decided

JUDGES:

BEFORE: THE HONORABLE DOMINICK L. DiCARLO, CHIEF JUDGE, AND JANE A. RESTANI and R. KENTON MUSGRAVE, JUDGES.

OPINION BY:

Dominick L. DiCarlo; Jane A. Restani; R. Kenton Musgrave

ORDER

Upon consideration of defendant's motion for a stay of enforcement of judgment, it is hereby

ORDERED that defendant's motion is GRANTED; and it is further

ORDERED that execution of the money judgment awarded and the effect of the declaratory and injunctive relief granted are stayed until the later of (1) the expiration of the period for filing a notice of appeal; or (2) the conclusion of any appellate proceedings.

Dominick L. DiCarlo, Chief Judge

Jane A. Restani, Judge

R. Kenton Musgrave, Judge

Dated: New York, New York, This 4th day of December, 1995.

UNITED STATES SHOE CORPORATION,
Plaintiff-Appellee,
v. THE UNITED STATES,
Defendant-Appellant.

96-1210

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

114 F.3d 1564; 1997 U.S. App. EXIS 13032; 97-1 U.S. Tax Cas. (CCH) P70,078; 79 A.F.T.R.2d (RIA) 2813; 1997 AMC 2551

June 3, 1997, DECIDED

SUBSEQUENT HISTORY:

As Amended June 13, 1997.

PRIOR HISTORY:

Appealed from: United States Court of International Trade. Senior Judge DiCarlo.

DISPOSITION:

AFFIRMED.

COUNSEL:

Brian S. Goldstein, Siegel, Mandell & Davidson, P.C., of New York, New York, argued for plaintiff-appellee. With him on the brief were Steven S. Weiser, Laurence M. Friedman, Paul A. Horowitz, and Gregory S. McCue.

David M. Cohen, Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for defendant-appellant. With him on the brief were Frank W. Hunger, Assistant Attorney General, Jeanne E. Davidson, Assistant Director, and Todd M. Hughes, Attorney. Of counsel on the brief were Richard McManus, Office of the Chief Counsel, United States Customs Service, and Martin R. Cohen, Office of the General Counsel, Army Corps of Engineers, of Washington, D.C.

Melvin S. Schwechter, LeBoeuf, Lamb, Greene & MacRae, L.L.P., of Washington, D.C., for amici curiae Aluminum Company of America, et al. With him on the brief were John C. Cleary and Julie A. Coletti.

Thomas J. Kovarcik, of Irving A. Mandel, Counselor At Law, for amicus curiae Allied Textile Sales Company. With him on the brief were Irving A. Mandel, Steven R. Sosnov, and Jeffrey H. Pfeffer.

Robert E. Burke, Barnes, Richardson & Colburn, of Chicago, Illinois, for amicus curiae Amoco Chemical Company. With him on the brief were Christopher E. Pey and Cindy H. Chan. Of counsel was Lawrence M. Friedman.

John M. Peterson, Neville, Peterson & Williams, of New York, New York, for amici curiae Aris-Isotoner, Inc., et al. Of counsel on the brief were George W. Thompson, James A. Marino, and Arthur K. Purcell.

Mark S. Zolno, Katten, Muchin & Zavis, of Chicago, Illinois, for amici curiae Baxter Healthcare Corporation, et al. With him on the brief were Michael E. Roll and Gregory W. Bowman.

William D. Outman, II, Baker & McKenzie, of Washington, D.C., for amici curiae Brown-Forman Corp., et al.

With him on the brief were Kevin M. O'Brien, Lynn S. Baker, and Teresa A. Gleason.

Barry E. Cohen, Crowell & Moring, L.L.P., of Washington, D.C., for amicus curiae E.I. du Pont de Nemours & Co.

Patrick D. Gill, Rode & Qualey, of New York, New York, for amici curiae General Chemical Corporation, et al. With him on the brief were John S. Rode, Michael S. O'Rourke, and R. Brian Burke.

Steven P. Florsheim, Grunfeld, Desiderio, Lebowitz & Silverman LLP, of New York, New York, for amici curiae Mondial International Corp., et al. With him on the brief were Robert B. Silverman and Erik D. Smithweiss.

Frederic L. Wood, Donelan, Cleary, Wood & Maser, P.C., of Washington, D.C., for amicus curiae The National Industrial Transportation League. With him on the brief were Nicholas J. DiMichael, and Antoine P. Cobb.

Munford Page Hall, II, Dorsey & Whitney LLP, of Washington, D.C., for amicus curiae New Holland North America, Inc. With him on the brief were John B. Rehm, Robert W. Bras, and Karen A. Zughaib.

Peter Buck Feller, McKenna & Cuneo, L.L.P., of Washington, D.C., for amicus curiae Swisher International, Inc. With him on the brief were Lawrence J. Bogard, Joseph F. Dennin, Michael K. Tomenga, and Brian J. O'Shea.

Steven H. Becker, Coudert Brothers, of New York, New York, for amici curiae Texaco Refining and Marketing Inc., et al. With him on the brief were Charles H. Critchlow and Claire R. Kelly.

JUDGES:

Before MAYER, MICHEL, RADER, and BRYSON, Circuit Judges, and SMITH, Senior Circuit Judge. Opinion for the court filed by Circuit Judge MICHEL. Dissenting opinion filed by Circuit Judge MAYER.

OPINION BY:
MICHEL

OPINION:

MICHEL, Circuit Judge. The United States ("the government") appeals from the December 4, 1995 decision of the United States Court of International Trade granting summary judgment to United States Shoe Corporation ("US Shoe") and holding that the court possessed jurisdiction over this case pursuant to 28 U.S.C. § 1581(i), not 28 U.S.C. § 1581(a), that the Harbor Maintenance Tax ("HMT") violates the United States Constitution and is therefore void as applied to exports. See *United States Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). The case was submitted for our decision after oral argument by the parties before a five-judge panel on February 7, 1997, following briefing not only by the parties but also by numerous amici. The Court of International Trade correctly exercised jurisdiction under 28 U.S.C. § 1581(i) and correctly concluded that the HMT violates the Export Clause, U.S. Const., Art. 1, § 9, cl. 5, because it is a tax on exports rather than a user fee. The HMT, as applied to exports, is not a user fee but rather a tax because it is paid by the exporter, not the direct user of the harbor, and is calculated solely based on the value of the cargo loaded for export and bears no reasonable relationship to the cost of the use of the port facilities maintained by the government and therefore cannot be a fair approximation of use. We therefore affirm the judgment invalidating the HMT as applied to exports and ordering a refund to US Shoe.

BACKGROUND

The HMT was imposed by Congress as part of the Comprehensive Water Resources Development Act of 1986 ("the Act"), Pub. L. No. 96-622, 100 Stat. 4082 (codified at 26 U.S.C. § 4461). The Act also established the Harbor Maintenance Trust Fund ("the Trust Fund") to provide for the operation and maintenance of channels and harbors. The details of the HMT, the Act, and the Trust Fund relevant to this lawsuit are set forth in the trial court's opinion and are not repeated here in detail. See *United States Shoe*, 907 F. Supp. at 411-12.

In short, the Act imposes an ad valorem tax of 0.125 percent of the value of the commercial cargo involved in "any port use" of federally maintained navigable waterways. 26 U.S.C. § § 4461, 4462(a)(2) (1994). The HMT is imposed on both exports and imports. As it specifically applies to exports, the HMT statute provides:

> (a) General rule.--There is hereby imposed a tax on any port use.
>
> (b) Amount of tax.--The amount of tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
>
> (c) Liability and time of imposition of tax.--
>
> (1) Liability.--The tax imposed by subsection (a) shall be paid by--
>
> (B) in the case of cargo to be exported from the United States, the exporter ....
>
> (2) Time of imposition.--Except as provided by regulations, the tax imposed by subsection (a) shall be imposed--
>
> (A) in the case of cargo to be exported from the United States, at the time of loading ....

26 U.S.C. § 4461 (1994) (emphasis added). The term "port use" is defined as "the loading of commercial cargo on, or ... the unloading of commercial cargo from, a commercial vessel at a port." 26 U.S.C. § 4462(a)(1) (1994). The term "port" is defined as "any channel or harbor (or component thereof) in the United States, which ... (i) is not an inland waterway, and (ii) is open to public navigation." 26 U.S.C. § 4462(a)(2)(A) (1994). The term "commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire," but does not include "bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or ... fish or other aquatic animal life caught and not previously landed on shore." 26 U.S.C. § 4462(a)(3) (1994). Thus, although there are certain exemptions, the tax is generally imposed against all imports, exports, domestic shipments, and passengers.[1] See 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A) (1994). Money collected pursuant to the Act is transferred by Customs to the Trust Fund for disbursal upon further appropriation by Congress. See 26 U.S.C. § 9505(b) (1994). The fees were designed to finance the cost of harbor dredging. See S. Rep. No. 99-126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647. By the end of fiscal year 1994, the total amount of fees collected and deposited in the Trust Fund was over 2.7 billion dollars, of which over 700 million dollars was paid by exporters.

Although the HMT was first enacted in 1986, there were no constitutional challenges until recently. US Shoe paid the HMT on articles exported for the period April 1 through June 30, 1994. US Shoe then brought suit in the Court of International Trade for the refund of these payments on the ground that the HMT, as applied to exports, is unconstitutional. In January 1995, given the large number of pending lawsuits challenging

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[1] For passengers the tax is calculated based on the charge assessed for transportation. See 26 U.S.C. § 4462(a)(5)(B) (1994).

the constitutionality of the HMT[2] the Court of International Trade established a three-judge panel and heard this case as a test case. See 28 U.S.C. § 255 (1994) (authorizing the chief judge of the Court of International Trade to designate a three-judge panel to hear cases raising the constitutionality of any Act of Congress or which have broad or significant implications in the administration or interpretation of customs laws).

The parties filed cross-motions for summary judgment and, on October 25, 1995, the trial court issued its decision granting US Shoe's motion for summary judgment. *United States Shoe*, 907 F. Supp. at 408. The trial court first concluded that the HMT was unconstitutional as applied to exports because it constituted a tax, rather than a user fee, as it did not have regulation as its primary purpose and it did not recoup the costs of services provided to the payor. *Id.* at 413-18. Specifically, the trial court noted that "the Act neither discourages nor regulates use of a harbor; neither does it so intend." *Id.* at 413. The trial court also found that "the primary purpose of the [HMT] is to raise revenue, as Congress has imposed 'a duty under the pretext of fixing a fee.'" *Id.* at 414 (citation omitted). The trial court further determined that jurisdiction was not properly based on 28 U.S.C. § 1581(a), because there was no decision of Customs to protest. *Id.* at 418-21. In part, the trial court relied on the fact that "Customs does not determine the application, policies, or rates of the [HMT], but merely serves to implement its provisions." *Id.* at 420. Rather, the trial court held jurisdiction was properly based on 28 U.S.C. § 1581(i) because Congress directed that the HMT be treated as a customs duty and

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[2] As of the summer of 1996, there were approximately 2400 complaints pending in the Court of International Trade, as well as approximately 40 complaints pending before the Court of Federal Claims and one complaint pending in district court. The great majority of these lawsuits have been stayed pending the outcome of this appeal.

because customs duties, by their very nature, provide for revenue from imports. *Id.* at 421. The Court of International Trade enjoined the government from assessing and collecting the HMT and ordered the parties to file a proposed judgment.

The government appealed, urging that we hold that jurisdiction over these disputes is only proper pursuant to 28 U.S.C. § 1581(a) and that the HMT is constitutional. We heard this case as a five-judge panel pursuant to Local Rule 47.2, which states that "appeals in cases from the Court of International Trade decided by a three-judge court pursuant to 28 U.S.C. § 255 will ordinarily be referred to a panel of five judges." Fed. Cir. R. 47.2.

ANALYSIS

We "review the summary judgment in this case 'for correctness as a matter of law, deciding de novo the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist.'" *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993) (quoting Guess? *Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991)). Here, the parties do not dispute any facts, but only dispute questions of law relating to the proper interpretation of the jurisdictional statutes and the constitutionality of the HMT as applied to exports.

I.

The parties do not dispute that the Court of International Trade possesses exclusive jurisdiction over this type of matter seeking a refund of HMT pursuant to 28 U.S.C. § 1581, in light of Congress' provision that "for purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2) (1994). The only dispute is whether subsection (a) or subsection (i) of section 1581 applies. The dispute exists be-

cause subsection (a) requires that the exporter first file a protest and limits recovery to amounts protested within 90 days of payment, while subsection (i) states only that the action must be initiated within two years of the date on which the cause of action accrued.

The relevant statutory subsections provide as follows:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subjection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for -

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section. ...

28 U.S.C. § 1581 (1994).

A.

Although admitting that it does not fit perfectly, the government argues that subsection 1581(a) nevertheless confers jurisdiction over this dispute. The government argues section 1581(a) is the "established route" for obtaining judicial review of duties, charges, and exactions imposed by Congress. As

Congress envisioned that the HMT would be treated like a duty, the government argues jurisdiction under this subsection is the only logical result. The government admits, as it must, that subsection (a) requires that prior to the time an exporter can seek judicial review, Customs must issue a decision, the decision must be protested, and the protest must be denied. See 19 U.S.C. §§ 1514 (stating that decisions of the Customs Service are final unless a protest is filed), 1515 (stating that all protests will be reviewed within two years of filing). The government argues that the relevant "decision" is Customs' acceptance of the exporter's payment. In support, the government points to a generic regulation suggesting that the date of exaction (the date of payment) constitutes a protestable event. See 19 C.F.R. § 174.12(e) (1996) ("Protests shall be filed ... within 90 days after ... the date of the decision, involving neither a liquidation nor reliquidation, as to which the protest is made (e.g., the date of an exaction ...."). According to the government, this regulation eliminates any confusion regarding the availability, timing or other procedures applicable to a protest and over 1000 HMT protests have been received by Customs pursuant to this regulation.

Relying on legislative history, US Shoe responds that Congress directed that the HMT be treated like a duty so that the Court of International Trade, with its expertise in international trade matters, would have jurisdiction over any disputes and so as to facilitate Customs' collection and processing of the HMT. See H. Rep. No. 99-228 at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714-15 ("In order to facilitate administration and collection of the port user charges [i.e., the HMT] by the U.S. Customs Service, ... all administrative and enforcement provisions ... are to apply ... as if such charges were customs duties."). Thus, according to US Shoe, it is not clear that Congress intended for jurisdiction over this type of dispute to fall within a particular subsection of section 1581, and there is no evidence that Congress intended to amend the requirement of 19 U.S.C. § 1514 that there must be a Customs "decision"

before filing a protest. US Shoe further argues that acceptance of payment is not a protestable decision and that therefore subsection (a) cannot apply.

We find US Shoe's arguments persuasive. Subsection (a) is not directly applicable because it applies to suits commenced to contest the denial of a protest. Decisions of the Customs Service are final unless a protest is filed. 19 U.S.C. § 1514(a) (1994). Decisions can refer to, for example, "the classification and rate and amount of duties chargeable" or "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." *Id.* While the HMT is likely a charge or exaction, we do not believe that the actual payment or receipt of the HMT can be a "decision" of Customs, as Customs has not made any decision -- it merely passively collects money in the amount required by the statute. Customs doesn't even notify exporters of the need to pay the HMT; rather, the exporter pays all accumulated fees on a quarterly basis by simply mailing a check or money order to Customs along with appropriate forms. See 19 C.F.R. § 24.24(e)(2)(ii) (1996).

Typically, "decisions" of Customs are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty. Indeed, prior case law indicates that Customs must engage in some sort of decision-making process in order for there to be a protestable decision. Thus, for example, in *Dart Export Corp. v. United States*, 43 C.C.P.A. 64 (1956), one of our predecessor courts held that Customs' acceptance of estimated duties paid by an importer upon entry did not constitute a final, protestable decision which would deprive the government of the right to liquidate the entry at a later date, because the payment was based entirely on information provided by the importer, rather than after analysis and adjudication by Customs. *Id.* at 69-70, 74. Likewise, here, the HMT is based entirely on the exporter's information and calculation. See 19 C.F.R. § 24.24(e)(2)(i) (1996). Specifically, this regulation provides that:

> When cargo is loaded on a commercial vessel for export at a port within the definition of this section, the exporter of that cargo (the name that appears on the SED or equivalent document authorized under 15 CFR 30.39(b)) is liable for the payment of the port use fee at the time of loading. The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation.

Id. Thus, Customs merely passively collects payments calculated by the exporters pursuant to statutes and regulations and performs no active role whatsoever. It performs no analysis; it issues no directives or decisions; it imposes no liabilities.

Similarly, in *Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994), this court held that the Court of International Trade lacked jurisdiction over Mitsubishi's complaint under section 1581(a) because the Customs Service did not make any antidumping "decisions" as Customs merely followed the Department of Commerce's instructions in assessing and collecting specified duties. *Id.* at 977. The court pointed out that Customs' role was merely ministerial and that Customs did not determine the rate or amount of the antidumping duties. *Id.* Commerce actually conducted the antidumping duty investigation, calculated the antidumping duties, and issued the antidumping order; Customs merely collected the estimated duties. *Id.* at 976. Likewise, here, there was nothing for Customs to decide, because all substantive particulars regarding the imposition and amount of HMT are established by Congress. The amount of the HMT (0.125 percent of the value of the commercial cargo) is set by statute, 26 U.S.C. § 4461, and the exporter performs the calculation, 19 C.F.R. § 24.24. Customs is merely collecting the HMT in the amount and manner specified by Congress. Thus, there is simply no decision that US Shoe could have protested, or should have been required to protest, in order to allow the Court of International Trade to hear this dispute.

Norfolk & W. Ry. v. United States, 843 F. Supp. 728 (Ct. Int'l Trade 1994), aff'd, 62 F.3d 1395 (Fed. Cir. 1995), relied on by the government, is not to the contrary. There, a railroad company brought an action challenging user fees collected on vehicles and vessels entering the United States. *Id.* at 729. The railroad company filed a user fee refund request with the Secretary of the Treasury on the grounds that its railroad barges were not ferries and that, as barges, they were subject to a cap on user fees. *Id.* at 730. The refund request was granted. However, several years later, Customs informed the railroad company that its barges were indeed ferries and not subject to the cap. *Id.* The court concluded that the user fees were charges subject to protest and that jurisdiction fell under 1581(a). *Id.* at 732-33 ("The user fees at issue in this case are clearly 'charges' within the meaning of § 1514(a) and, therefore, are subject to protest under this subsection."). A careful reading of this case, however, makes clear that the user fees were protestable charges because there had been a specific decision by Customs applying statutory definitions that certain vessels were ferries rather than barges, thus subjecting the cargo to user fees. *Id.* at 730, 733. There, Customs was authorized to collect certain user fees on vehicles and vessels entering the United States. *Id.* at 729. The Railway transported railroad cars on barges into the United States from Canada. *Id.* The amount of fees due varied based on whether the barge was considered a ferry or not. The Railway was notified by Customs that it was required to pay a $ 7.50 user fee for each of the railroad cars, but no fees for its barges because Customs considered the barges to be ferries. *Id.* at 730. The Railway filed a protest of that decision. There is no comparable analysis and decision here. This is not a case where, for example, US Shoe contended its exports fell within one of the HMT exemptions and Customs decided to the contrary.

We therefore hold that because the collection of the HMT does not involve a protestable decision on the part of Customs, the trial court correctly concluded that jurisdiction over this

dispute did not arise under 28 U.S.C. § 1581(a). In light of this holding, we need not reach US Shoe's additional arguments that any protest it might have filed would have been futile or manifestly inadequate.

B.

Given that the Court of International Trade did not possess jurisdiction under 28 U.S.C. § 1581(a), if it possessed jurisdiction over this dispute, as the government concedes that it did, it can only have been pursuant to the default provision, 28 U.S.C. § 1581(i). The government argues subsection 1581(i) cannot apply because that subsection provides for jurisdiction in only those limited circumstances when jurisdiction under any of the other subsections is unavailable or manifestly inadequate. However, this is no bar to jurisdiction here because jurisdiction under the other subsections, specifically subsection (a) -- the only other arguable possibility -- is unavailable. The government also argues that, by its own terms, subsection 1581(i) applies only to imports, not to exports.

We do not agree. As US Shoe persuasively argues, the Court of International Trade properly exercised its jurisdiction under 28 U.S.C. § 1581(i). Congress expressly directed that for jurisdictional, administrative and enforcement purposes, the HMT was deemed to be a customs duty. Thus, it is beyond dispute that Congress intended the Court of International Trade to have jurisdiction over disputes regarding the HMT, as the Court of International Trade has exclusive jurisdiction over customs matters. Moreover, there is no argument made by either US Shoe or the government that the Court of International Trade can exercise jurisdiction over this dispute pursuant to any statute other than 28 U.S.C. § 1581. As discussed above, subsection 1581(a) does not apply. The only other credible, and indeed the only other argued, possibility is subsection 1581(i). Admittedly, subsection (i) does not specifically refer to disputes concerning the constitutionality of fees such as the HMT. It does, however, specifically refer to the "administration and

enforcement with respect to the matters referred to in" the preceding paragraphs, including any law providing for revenue from imports. This dispute does involve the "administration and enforcement" of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports. Additionally, the mere fact that subsection 1581(i) does not speak precisely to this issue and does not use the word "exports" is not dispositive, as it "was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions ...." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994) (emphasis added).

Thus, in light of the fact that the HMT is a law providing for revenue from imports (as well as exports) and the fact that subsection 1581(i) grants broad residual authority concerning import transactions to the Court of International Trade, the trial court properly asserted jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(i). We must therefore consider whether the trial court correctly held that the HMT, as applied to exports, is unconstitutional.[3]

II.

The United States Constitution provides that:

> No Tax or Duty shall be laid on articles exported from any State.

U.S. Const., Art. I, § 9, cl. 5. The Supreme Court recently analyzed the Export Clause in *United States v. International Bus. Mach.*, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996). There, the Supreme Court held that the Export Clause does not permit "the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit." *IBM*, 116 S. Ct. at 1795.

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[3] We need not and do not address the constitutionality of the HMT statute as applied to anything except exports.

In other words, even those taxes that are imposed equally on exports and imports or other articles of commerce are prohibited by the Export Clause. See *id.* at 1803. ("The better reading [of the Export Clause], that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all.") (emphasis added). Thus, if the HMT is a tax on goods in export transit, it is invalid. We address first whether the HMT is a tax and second whether the HMT is imposed on goods in export transit.

A.

The HMT statute provides:

(a) General rule.--There is hereby imposed a tax on any port use.

(b) Amount of tax.--The amount of tax imposed by subsection

(a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) Liability and time of imposition of tax.--

(1) Liability.--The tax imposed by subsection (a) shall be paid by--

(B) in the case of cargo to be exported from the United States, the exporter

(2) Time of imposition.--Except as provided by regulations, the tax imposed by subsection (a) shall be imposed--

(A) in the case of cargo to be exported from the United States, at the time of loading ....

26 U.S.C. § 4461 (1994) (emphasis added). Thus, this statute, at least as it applies to exports, appears to be a prohibited tax on exports in that the tax is imposed based on the value of the exported goods and accrues at the time the goods are loaded on a ship for export. Although the legislative history refers to the HMT as a user fee, the statute itself repeatedly refers to the HMT as a tax and is codified in the Internal Revenue Code.

The government, however, argues that the fact that the HMT is referred to as a tax is not dispositive and that the HMT is actually a user fee, not a tax. The test used to distinguish between taxes and user fees was first articulated in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972), and more recently applied in *Massachusetts v. United States*, 435 U.S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978). That test states that user fees are valid as such so long as they: (1) do not discriminate against the constitutionally protected interest (here, exports); (2) are based on a fair approximation of use; and (3) are not excessive in relation to the cost to the government of the conferred benefits. See *Massachusetts*, 435 U.S. at 464. We need not decide whether the HMT discriminates against exports or is excessive in relation to the cost to the government of the conferred benefits. Instead, we discuss only whether the HMT is based on a fair approximation of use.

US Shoe argues, and the trial court held, that the HMT is not a fair approximation of the cost of the benefits received by exporters because there is no correlation between the amount of HMT an exporter pays and the amount the exporter uses the port. In other words, the amount of the HMT has no relationship to the size or weight of the vessel or the necessary depth of the port required by the vessel. For example, "low value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters." *US Shoe*, 907 F. Supp. at 415. Yet, even though the bulk cargo exporters generally require a larger vessel and a deeper port, and therefore "use" the port to a greater extent, they pay a lower tax than high value, low bulk cargo exporters. Moreover, a ship that docks but does not load or unload cargo is not required to pay a fee, even though that ship otherwise utilizes the port. Additionally, there is apparently no correlation between the amount of fees collected at a particular port and the expenditure of funds from the Trust Fund to maintain that

particular port. Indeed the trial court found that "most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures." *Id.* Finally, it is not consistent with a true user fee that so many users are exempted, such as those carrying bunker fuel, ship's stores, equipment necessary for the operation of the vessel and fish and other aquatic animal life not previously landed on shore, 26 U.S.C. § 4462(a) (1994), since ships carrying these products use the port facilities to the same extent as ships carrying products subject to the HMT.

The government argues that the HMT is based on a fair approximation of use and, in support, relies on other cases in which similar ad valorem user fees have been upheld. The government first relies on *United States v. Sperry Corp.*, 493 U.S. 52, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989), where the Supreme Court held that a user fee of 1.5% of all awards recovered from the Iran-United States Claims Tribunal was not an unconstitutional taking but a valid user fee. There, Sperry had argued that the fee could not be a user fee because it did not bear any relationship to the cost of the tribunal to the United States or the value of the tribunal to Sperry. *Id.* at 60. In rejecting this argument, the Court stated that a user fee need not be "precisely calibrated to the use that a party makes of government services" and need only be a "fair approximation." *Id.* The Court also recognized that, where user fees are applied to a large number of parties, some users will be charged more and some less than in a perfect user-fee system. *Id.* at 61. Here, the government argues that, as in *Sperry*, the fact that the benefits received do not exactly correspond to the amount of the HMT does not render the HMT statute unconstitutional.

We do not find *Sperry* dispositive for two reasons. First, unlike the present case, in *Sperry* the person receiving the award and paying the fee was the direct beneficiary of the process for which they were paying. In other words, parties that had their claims adjudicated by the tribunal or otherwise received the benefit of the tribunal were required to pay the costs

of establishing and maintaining the tribunal. Here, on the other hand, as applied to exports, the direct users -- the ship owners -- do not contribute to the maintenance of the port and it is only indirect users -- the export companies -- that are required to pay the HMT. Second, the *Sperry* Court, in distinguishing a case holding registration and axle taxes unconstitutional as a violation of the Commerce Clause, stated that the standard applied under the Just Compensation Clause was less strict than that which would be applied in a Commerce Clause analysis where one is concerned about discrimination against interstate commerce. *Id.* at 61. To this we would add that, per *IBM*, the Export Clause is still more restrictive. See *IBM*, 116 S. Ct. at 1799 ("Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.") (footnote omitted).

The government also relies on *Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), where the Eleventh Circuit concluded that an airport access fee enacted to provide funds to maintain the airport and based on a rental car company's gross business receipts was a valid user fee. Alamo argued the fee was not a fair approximation because it bore no relation to Alamo's use of the airport and instead varied in proportion to the revenue generated by Alamo's customers. *Id.* at 520. Alamo argued that its only use of the airport was to drive on the airport roads to pick up customers and that its fee should be limited to a pro rata road use fee. *Id.* at 519. The court disagreed, reasoning as follows:

> Although imprecise in particular applications, the Authority's decision to measure Alamo's use of the airport facility by the gross receipts generated from Alamo's airport

> customers is not irrational. The Authority could reasonably conclude that the ten percent fee on average represents Alamo's use of the airport facility. It stands to reason that in general the more money Alamo makes from airport passengers, the more trips Alamo has made to the airport.

Id. at 520 (emphasis added). Thus, while imprecise, the fee was not unfair or irrational, but was instead a "fair approximation." Again, the payer of the fee in Alamo was the direct beneficiary of the use of the airport, unlike here where the exporter is not the direct beneficiary and is not assured harbor maintenance at the harbor where the exporter's goods are loaded. Moreover, in rejecting Alamo's argument that the fee was unreasonable because it was required to pay a greater fee for a person who rented a car for seven days than for a person who only rented a car for one day even though each individual made equal use of the airport, there the court found that the 10% fee was acceptable because it represented, on average, Alamo's use of the airport. *Id.* Here, there is no such finding that the HMT represents, on average, an exporter's use of the port and, as discussed above, the court concluded that the HMT was not based on a fair approximation of use, thereby implicitly finding that the HMT did not represent, on average, an exporter's use of the port.

The government also argues, without providing any support, that by using the words "fair approximation of use" the Supreme Court in *Massachusetts* intended to refer to the value of the benefits received, rather than the costs of the benefits received. The government then asserts that the HMT is a fair approximation of the value of the benefits received because the profitability of higher value cargo is higher than for lower value cargo. We do not agree. First, the *Massachusetts* case itself suggests that the cost of the benefits, rather than the value, is the appropriate measure in its statements that "Congress believed that four measures, taken together, would fairly reflect some of the cost of the benefits" and "the present scheme nevertheless is a fair approximation of the costs of the benefits

each aircraft receives." 435 U.S. at 468 (emphasis added). Second, higher value merchandise does not always correlate to a higher profit margin and the government has failed to present any facts that would suggest that, even on average, this is the case. Thus, exporters of higher value goods do not necessarily receive a greater benefit, even in terms of value, than exporters of lower value goods. Third, the exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use. Fourth, the HMT does not pay for services, such as police, fire or rescue units, that provide benefits to the exporters by keeping the harbors safe whether the exporters use those services or not. See *Maine v. Department of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992) (refusing to grant summary judgment that fee used to pay for a hazardous waste spill response team was not based on a fair approximation of use because, even though the Navy had not yet needed the team, it was available to minimize any future spill at the shipyard).[4] Therefore, even if the value of the benefits received is an accurate measure, we hold that the HMT is not a fair approximation of the value of the benefits received by the exporters.

We therefore hold that the HMT is not based on a fair approximation of use and, as such, is not a permissible user fee. Although the decision to impose the HMT on an ad valorem basis may have substantially reduced administrative costs and burdens, it is nevertheless not based on a fair approximation of use. Since the HMT is not a valid user fee, it must be a tax.

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[4] Notably, in this case the appellate court rejected the Navy's argument that the measure of the authorized fee for services is the value to the recipient. See *Maine*, 973 F.2d at 1014.

B.

The government also argues the HMT is not levied against exported articles and, therefore, even if it is a tax, it is not unconstitutional. Rather, according to the government, the fee is imposed on the use of federally maintained harbors by shippers,[5] exporters[6] and importers[7] of commercial cargo, regardless of destination, and is even imposed on the transportation of passengers. Thus, according to the government, the HMT is "an ordinary burden of taxation" rather than a tax or duty imposed on "exported articles."

We do not agree. The Constitution prohibits taxation of articles in the course of being exported. See *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69, 67 L. Ed. 865, 43 S. Ct. 485 (1923) ("The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was 'laid on articles exported from any State,' because that is forbidden in terms by the Constitution."). Thus, while a tax may be constitutional if imposed on goods during the manufacturing process, even if they are intended for later export, a tax is not constitutional if imposed on those very same goods after they are loaded on a vessel for export or if imposed when delivered to the carrier for export. See *id.* (holding unconstitutional a tax on baseball bats and balls imposed on "the very act that passed the title and that would have incurred the

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[5] Shippers, i.e., the persons or corporations that pay the freight, are responsible for paying the HMT on commercial shipments within the United States. See 19 C.F.R. § 24.24(e)(1)(i) (1996).

[6] Exporters, i.e., the persons or corporations whose name appears on the SED document or the equivalent document, are liable for the HMT on exports. See 19 C.F.R. § 24.24(e)(2)(i) (1996).

[7] Importers are liable for the HMT on imports. See 19 C.F.R. § 24.24(e)(3)(i) (1996).

tax had the transaction been domestic, [and that] committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods."). Here, the HMT is imposed on an ad valorem basis at the time the exported goods are loaded on the vessel, rather than at some prior point in time when the goods are not yet bound for export. The exporter, rather than the manufacturer, pays the tax. In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(a), and is based on the value of the goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A). See also 19 C.F.R. § 24.24(e)(2)(i) ("The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation."). Thus, we conclude that the HMT, as applied against US Shoe, is imposed on exports.

C.

The government makes several additional arguments in support of the constitutionality of the HMT. First, the government argues that the Export Clause is distinct from the Commerce Clause and, consequently, Congress may impose a tax or duty pursuant to its authority to regulate commerce, so long as the purpose of the tax or duty is not to raise revenue for the general welfare. See *Armour Packing Co. v. United States*, 209 U.S. 56, 79, 52 L. Ed. 681, 28 S. Ct. 428 (1908) ("But it is to be observed that the Constitution provides for a burden only by the way of taxation or duty, and, unless the alleged interference amounts to such taxation or duty, it does not come within the constitutional prohibition."). Thus, according to the government, the relevant inquiry is whether the HMT was enacted pursuant to Congress' authority to regulate commerce, not whether it imposes a burden on exports. See *New Orleans Steamship Ass'n v. Plaquemines Port, Harbor and Terminal Dist.*, 874 F.2d 1018, 1021-22 (5th Cir. 1989) (holding that a

port could impose reasonable fees against ships to finance emergency response services). Second, the government argues that the trial court adopted an overly broad interpretation of the Export Clause because it failed to recognize that the sole purpose of the Export Clause was to prevent the northern states from crippling the export-dependent southern states -- not to restrict Congress' authority to impose nondiscriminatory fees designed to recoup costs.

We do not agree. The Supreme Court recently reaffirmed the breadth of the Export Clause in the face of the argument that its historical purpose justified a narrow construction. *IBM*, 116 S. Ct. at 1803 ("While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language."). Moreover, the power to regulate commerce cannot completely override the effect of the Export Clause. See *North Am. Co. v. SEC*, 327 U.S. 686, 704-05, 90 L. Ed. 945, 66 S. Ct. 785 (1946) ("This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as section 9 of Article 1 and the Bill of Rights."); see also *IBM*, 116 S. Ct. at 1798 (rejecting government's request to "reinterpret the Export Clause to permit the imposition of generally applicable, nondiscriminatory taxes as [the Court has] under the Commerce Clause ...."). It is undeniable that Congress may regulate commerce by means such as encouraging or discouraging certain actions using regulatory charges to achieve compliance. See *South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (imposition of a 50-cent deduction on proceeds of all milk sold commercially is constitutional where "the clear language and structure of the [statute] indicates that its primary purpose is regulation" and the "purpose is to reduce overproduction of milk and shift some of the financial burden of the price support system."). Likewise, it is beyond dispute that Congress may raise money to recover the expenses of a

regulatory program. See, e.g., *New Orleans*, 874 F.2d at 1021-22 ("Courts have consistently held that ships may be made to pay for services they get.").

It is, however, also beyond dispute that Congress cannot merely impose a direct economic burden on merchandise for export in the absence of regulation. See *IBM*, 116 S. Ct. at 1798-99 (rejecting the government's argument that the Commerce, Import-Export and Export Clauses should be read in harmony to permit the imposition of generally applicable, non-discriminatory taxes on exports). That is the case here. The government has failed to point to any indication that the HMT is intended to regulate commerce. Indeed, it appears that the HMT regulates nothing. It is not designed to reduce the overall use of the ports. See *Block*, 717 F.2d at 887. Rather, the HMT merely increases the cost of exporting by raising money to maintain the harbors in a manner that is not reasonably connected to the exporter's use of the harbors, and is therefore unconstitutional. Additionally, the government has not persuaded us that the HMT is designed to simply recoup the costs of the services, e.g., port maintenance, provided by the government because the sums paid by the exporter have no reasonable relationship to the cost or the value of the services received by the exporters, and the exporters are not even the direct beneficiaries of the services. Moreover, the mere fact that Congress may have attempted to exert its power under the Commerce Clause, as opposed to the Tax Clause, as evidenced by the fact that the HMT is not designed to raise money for the general welfare, is not dispositive. See *Moon v. Freeman*, 379 F.2d 382, 390-91 (9th Cir. 1967) (stating that the "test for determining when a monetary imposition nominally imposed under the commerce power should be considered an exercise of the power to raise revenue and therefore [be] barred by the export clause" is "to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution."). The HMT, in fact, does not regulate or facilitate

commerce and is, in effect, a tax. Therefore, as to exporters at least, the HMT is not an appropriate use of Congress' power to facilitate and regulate commerce.

New Orleans is distinguishable because there the fees were not assessed based on the value of the goods but were based on the benefit of services such as pilotage, towage and wharfage as measured by the size or weight of a vessel and paid by those benefiting from the service. 874 F.2d at 1020 (fees based on the number of days in port, the length of the vessel, and whether the ships load or unload cargo). Thus, the fees were based on the services received during port use. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 80 L. Ed. 215, 56 S. Ct. 194 (1935), also relied on by the government, is similarly distinguishable. There, the State Docks Commission, a state agency, imposed a fee on all vessels of a certain size that entered the port and vessel operators alleged that the fee violated the constitutional provision prohibiting imposition of duties of tonnage by states. *Id.* at 262-63. The fee was designed to reimburse the agency for the costs of policing the harbor. *Id.* at 264. There, however, the parties agreed that the fee was reasonable. *Id.* at 263. Here, the parties have not reached any such agreement, and, as we conclude above, the fee is not reasonable. Moreover, there the vessel operators -- the direct beneficiaries of the agency's policing actions -- paid the fee. *Id.* Furthermore, all such operators received the benefits for which they paid. *Id.* at 266 ("It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it."). Finally, the statute at question in that case also had a regulatory effect "plainly devised to insure the safety of vessels and to facilitate their use of the harbor." *Id.* at 264. Here, there is no such effect. The HMT does not ensure vessel safety, but was designed to cover the costs of dredging the harbors. See S. Rep. No. 99-126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647.

Finally, certain of the amici, given leave to file briefs here, argue that, because the HMT is unconstitutional and therefore void ab initio, all monies collected since the implementation of the HMT should be refunded. As US Shoe does not seek such recovery, there is no need for us to reach this issue. Similarly, we do not reach the issue of whether the HMT violates the Port Preference Clause because it is not necessary to our disposition of this appeal.

CONCLUSION

We conclude that the trial court properly exercised jurisdiction pursuant to 28 U.S.C. § 1581(i). Because Customs merely receives the funds from the exporters and transfers the funds to the Trust Fund without exercising any discretion, performing any analysis, calculating any amounts or issuing any decision or order, there was no Customs' "decision" for US Shoe to protest, and jurisdiction therefore could not be proper under 28 U.S.C. § 1581(a). Moreover, because the HMT is a tax, as opposed to a user fee, directly imposed on goods in export transit, we conclude that the HMT statute, as applied to exports, violates the Export Clause and is therefore invalid to the extent it applies to exports. Therefore, the trial court properly (1) granted summary judgment that the HMT statute was unconstitutional, (2) enjoined the government from collecting further HMT on exports, and (3) ordered it to refund the HMT amounts paid by US Shoe for the period assessed in the complaint. Accordingly, the judgment of the Court of International Trade is

AFFIRMED.

DISSENT BY:

MAYER

DISSENT:

MAYER, Circuit Judge, dissenting.

Because in my view the Harbor Maintenance Tax (HMT) is a user fee, it does not violate the Export Clause of the Constitution.

Statutes are presumed constitutional. *Fairbank v. United States*, 181 U.S. 283, 285, 45 L. Ed. 862, 21 S. Ct. 648 (1901). We must "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988). Indeed, courts must strive to avoid constitutional questions. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979) (courts are required to choose any reasonable construction of a statute that would eliminate the need to confront a contested constitutional issue); *Hooper v. California*, 155 U.S. 648, 657, 39 L. Ed. 297, 15 S. Ct. 207 (1895) (courts must resort to "every reasonable construction ... in order to save a statute from unconstitutionality"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

In light of these mandates, the question is whether the HMT is a tax or duty within the proscription of the Export Clause or whether it is a permissible user fee. Generally, a tax is enacted to raise revenue "to go to the general support of the govern-

ment," see *Head Money Cases*, 112 U.S. 580, 596, 28 L. Ed. 798, 5 S. Ct. 247 (1884), while a user fee is designed as a specific charge for the use of government facilities and services, see *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981). If it is the latter, we avoid the sticky question whether the assessment violates the Export Clause. So, we must construe the HMT as a user fee, if reasonable to do so, unless it is "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

Congress thought it was enacting a user fee. It is true that the statute calls the HMT a tax and that it resides in the Internal Revenue Code. It is equally true, however, that the HMT is levied on "port use." The label is not dispositive; we must dig deeper. See *Head Money Cases*, 112 U.S. at 595-96 ("The act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."); *Pace v. Burgess*, 92 U.S. 372, 375, 23 L. Ed. 657 (1875); see also *Fairbank*, 181 U.S. at 304 (courts analyze things, not names).

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." See *Crandon v. United States*, 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997 (1990). The object and policy of the HMT help to reveal its true identity. The Senate Report states: "The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels. The provision of a new, deeper channel is as much a service rendered to the shipper as pilotage, dockage, or wharfage."[1] S. Rep. No. 99-126, at 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644. The House Report similarly

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[1]Charges for harbor services like pilotage, wharfage, and dockage are permissible. See generally *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 80 L. Ed. 215, 56 S. Ct. 194 (1935).

states that the HMT is "a charge on use by a commercial vessel of a harbor or channel ('port') in the United States for the loading or unloading of commercial cargo on or from the vessel." H.R. Rep. No. 99-228, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6706 (emphasis added). In fact, the legislative history refers repeatedly to the HMT as being based on use. See, e.g., *id.* at 1, *reprinted in* 1986 U.S.C.C.A.N. at 6706 ("Harbor (Port) User Charges"); H.R. Conf. Rep. No. 99-1013, at 228 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6723, 6740 ("Port Use Tax"); S. Rep. No. 99-126, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 6640 ("user taxes"); *id.* at 135, *reprinted in* 1986 U.S.C.C.A.N. at 6705 (additional views of Sen. Lautenberg) ("user fee").

Moreover, the HMT was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (Act), "comprehensive" legislation that addressed myriad problems in the federal water resources development program. See S. Rep. No. 99-126, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6641. "Historically, the Federal Government had financed the full cost of designing, constructing, rehabilitating, maintaining, and operating the ... coastal harbors of the United States." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6643-44. Yet, the law did not "impose Federal user fees or charges on the beneficiaries of these expenditures." H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709. Congress found that traditional harbor maintenance policy would "not meet national needs" because it was "unlikely that the Federal Government [would] finance the construction of such port improvements." S. Rep. No. 99-126, at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6646. As the House Report explains: "Additional Federal investment is needed for operations and maintenance of U.S. channels and harbors (ports) in order to improve and maintain such ports for waterborne commerce. Such additional investment in U.S. ports will facilitate economic development and make the Nation's water transportation

system more efficient." H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709.

Importantly, Congress found that these needs were "clearly commercial." S. Rep. No. 99-126, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6644 (emphasis added). It decided "that a portion of Federal expenditures needed for port operations and maintenance should be borne by the direct beneficiaries of such expenditures," commercial users. H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709 (emphasis added). Congress targeted commercial users to help shoulder the fiscal burden of operations and maintenance costs for harbors and inland waterways because they are the parties who enjoy their benefits. The government "has an obvious interest in making those who specifically benefit from its services pay the cost." *Massachusetts v. United States*, 435 U.S. 444, 462, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978).

One of Congress' primary difficulties, however, was deciding how to craft a user fee to "help defray the costs of maintaining new harbors deeper than 45 feet."[2] S. Rep. No. 99-126, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6647. "In recent years, the Committee considered a variety of proposals involving harbor maintenance. These ranged from diverting a portion of customs revenues for harbor work to port-by-port maintenance fees to more studies. The debate in some cases is between high maintenance harbors and low maintenance harbors; in others it is between large ports and small ports; or between bulk cargo

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[2] Very few bays and estuaries have natural depths greater than 20 feet. S. Rep. No. 99-126, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Yet the size of vessels has so increased that harbors forty-five feet deep are now "inadequate for many fully loaded tankers." Id. at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Congress found that the constraints of these shallow harbors "add to the costs of importing crude oil and petroleum products," and that "deeper draft harbors would facilitate the export of U.S. coal and, eventually, other bulk commodities, such as grain and ores." *Id.*

and containerized cargo ports." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646. In fact, the Senate Subcommittee on Water Resources held twenty-six hearings over three Congresses and more than four years on the Act. *Id.* at 116, *reprinted in* 1986 U.S.C.C.A.N. at 6688. Ultimately, it opted to impose a nationally-uniform fee on the "value of the cargo passing through harbors." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646; see also *id.* at 111-12, *reprinted in* 1986 U.S.C.C.A.N. at 6684. The House Report explains that "the ad valorem basis of the charges is the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99-228, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 6710.

Critically, Congress mandated that fees collected from the HMT be used only for commercial navigation projects. [3]Monies in the Harbor Maintenance Trust Fund (HMTF) may be used only to pay (1) for the operations and maintenance costs of the United States portion of the St. Lawrence Seaway, and for the eligible operations and maintenance costs "assigned to commercial navigation of all harbors and inland harbors within the United States," 33 U.S.C. § 2238(a) (1994) (emphasis added), referenced in 26 U.S.C. § 9505(c)(1) (1994); and (2) for all of the expenses of administering the HMT incurred by the Departments of Treasury and Commerce and the U.S. Army Corps of Engineers, up to $ 5,000,000 per fiscal year, 26 U.S.C. § 9505(c)(3).[4] So, HMT charges, collected from com-

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[3] Interest earned on monies in the Harbor Maintenance Trust Fund (HMTF) also remains in the fund.

[4] 26 U.S.C. § 9505(c)(2) permits monies in the fund to be used to pay rebates of tolls or charges levied for use of the St. Lawrence Seaway, as required by 33 U.S.C. § 988a. Section 988a was amended in 1994, however, to waive the collection of tolls or charges on commercial vessels, instead of requiring commercial users to pay the

mercial users, may only be expended for harbor operations and maintenance costs incurred on their behalf.

The government has been true to this constraint. In its initial report to Congress on the HMTF's status, the government explained that operations and maintenance costs for commercial navigation were accounted for in the "Corps of Engineers Management Information System." First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1987 - 1992 at 2, P 6 [hereinafter First Report]. In deciding which expenditures were reimbursable, the government recognized that some projects have both a "commercial navigation" purpose and some other purpose, such as recreation, hydropower, or flood control. *Id.* at 3, P 7. All operations and maintenance expenditures made for single purpose commercial navigation projects were considered subject to reimbursement from the HMTF. *Id.* In contrast, on joint purpose projects, the government allocated costs to the project's different purposes in proportion to the benefits realized for each purpose, recovering only the commercial navigation costs. *Id.*; see also Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1993 at 1-2, P 4 (indicating continued compliance) [hereinafter Second Report]. This ensures that HMT funds collected from commercial users are spent for their benefit.

In sum, it surely does not violate Congress' intent to construe the HMT as a user fee. The question is whether it is reasonable to interpret it that way. In analyzing whether a particular charge constitutes a user fee, the Court has asked whether it: (1) discriminates against the constitutionally-protected interest; (2) is based on some fair approximation of the use of some system; and (3) is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred.

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toll or charge and then obtain a rebate. Pub. L. No. 103-331, § 339(a), 108 Stat. 2496.

Massachusetts, 435 U.S. at 464; *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972).

First, the HMT does not discriminate against exporters. Indeed, the trial court did not hold to the contrary; it simply bypassed the issue and ruled the HMT a tax based on the second and third prongs of the Massachusetts test. The HMT is levied against commercial users of United States ports and harbors, including exporters, importers, domestic shippers, and passenger carriers (except ferries, as defined). Congress found these groups to be the principal beneficiaries of harbor operations and maintenance projects. It also required that HMT monies be expended only for their benefit. That the statute exempts some harbor users from payment does not render the HMT discriminatory against exporters. Some exempted users, like recreational users, do not and would not benefit from operations and maintenance projects funded by the HMT because those projects are commercial in nature. Requiring such users to pay the fee would be unfair. Congress made reasonable policy decisions to exempt other users, such as nonprofit organizations transporting humanitarian and development assistance cargo. 26 U.S.C. § 4462(h); see also *id.* § 4462(b) (exempting cargo transported within Alaska, Hawaii, or any United States possession, or between those locales and the United States mainland "because of the high dependence of these islands' economies on waterborne commerce." H.R. Rep. No. 99-228, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6710). These exemptions do not compromise the HMT's non-discriminatory status.

Second, the HMT is based on a fair, if imperfect, approximation of exporters' use of, or privilege to use, United States harbors and ports. When the government "applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system." *United States v. Sperry Corp.*, 493 U.S. 52, 61, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989). "Perfect uniformity and perfect equality of taxation, in all the respects in which the human mind can view

it, is a baseless dream." *Head Money Cases*, 112 U.S. at 595. Consequently, the amount of a user fee need not be "precisely calibrated to the use that a party makes of Government services." *Sperry*, 493 U.S. at 60.

The government concedes that the HMT, like most user fees, is imperfect, but contends that it is a fair approximation of use. U.S. Shoe argues, and the court held, that this is wrong for four primary reasons: (1) all harbor users do not pay the fee, (2) there is no correlation between the charges collected at a particular port and expenditures for that port's maintenance and operations, (3) low-value, bulk cargo importers and exporters use the port facilities to a greater extent than high-value, non-bulk cargo importers and exporters yet pay lower fees, and (4) the ad valorem nature of the fee does not accurately measure use. The first three, of course, are the precise concerns with which the legislature wrestled over three Congresses and more than four years. The fourth challenge is to what Congress found to be "the only acceptable basis on which to impose such charges" because it was "uniform" and "minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99-228, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 6710. "This was obviously the judgment of Congress and we [should] abide by it." *Sperry*, 493 U.S. at 62. Notwithstanding, I address each issue in turn.

For the same reasons that the HMT is not discriminatory, the fact that all users of our harbors and ports do not pay the fee does not mean it is an unfair approximation of use by those against whom the assessment is levied. See *Evansville*, 405 U.S. at 717-18 (upholding a user fee as a fair approximation of the use of the facilities for whose benefit they are imposed even though "a majority of the actual number of persons who use facilities of the airports involved" were exempt, because the exemptions were not "wholly unreasonable"). Nor is there merit to U.S. Shoe's second argument that because fees collected at a particular port are not necessarily expended for op-

erations and maintenance at that port, the fee is not a fair measure of use. This is an overly narrow view. Users do not benefit only from access to the particular ports they use. Every exporter has all ports and harbors available to it. Those that never use certain ports benefit from them "in the sense that [they] are available for their use if needed and in that" the provision of better harbor maintenance services "makes the [ports] safer for all users." *Massachusetts*, 435 U.S. at 468; see also *Sperry*, 493 U.S. at 63.

Finally, U.S. Shoe's related third and fourth arguments do not establish that the HMT is not a fair approximation of use. Initially, there is great irony in the argument that the charge is unfair because high-value, non-bulk cargo carriers are assessed higher fees than low-value, bulk cargo shippers, yet allegedly "use" harbors to a lesser extent. Exporters generally ship low-value cargo, such as grain and coal, which is transported in bulk. See First Report at 3, P 9. Importers, on the other hand, tend to ship high-value cargo, like electronics and automobiles, which is not shipped in bulk. *Id.* Consequently, exporters are generally assessed lower fees than importers, yet they purportedly "use" the harbors to a greater extent because of the bulk nature of their shipments. Thus, it is the exporters themselves who allegedly are not bearing their fair share.

In addition to the irony, U.S. Shoe's argument is unpersuasive. First, not all bulk cargo is of low value, nor, undoubtedly, is all non-bulk cargo of high value. For example, some "high value" commodities, such as "petroleum," are transported in bulk. *Id.* Thus, to say that the HMT is unfair because low-value cargo carriers use ports to a greater extent than high-value cargo carriers is not wholly accurate. Second, even if a high-value cargo shipper never requires the use of harbors deeper than forty-five feet, there is nothing in the record to support the notion that the only operations and maintenance projects undertaken with HMTF monies are deep-harbor dredging. Indeed, U.S. Shoe does not argue that projects financed with HMTF monies are so limited. While projects are limited to those that

inure to the benefit of commercial users, the government has discretion to decide which projects those are. That some users, like exporters, transport some bulk products of lower value than some non-bulk products transported by other users, does not make the HMT a tax. Nor does its ad valorem structure.

It is beyond dispute that an ad valorem charge can be a user fee. See *Sperry*, 493 U.S. at 59-64; *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990); see also *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992). Notwithstanding, U.S. Shoe attempts to distinguish *Sperry* and *Alamo* on the ground that the parties assessed the user fees in those cases were direct beneficiaries of the provided services. Here, it argues, the direct beneficiaries are the vessel owners, not the importers and exporters who pay the fee. There are two problems with this argument. First, it flies in the face of Congress' finding that exporters are the direct beneficiaries. Congress decided that a portion of federal expenditures needed for port operations and maintenance should be borne by the direct beneficiaries of such expenditures, among whom it obviously included exporters and importers. Second, the Court rejected a similar argument in *Evansville*. There, it held that it is not "particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses." 405 U.S. at 714. Similarly, here it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses.

Finally, the HMT is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. The relevant inquiry is whether Congress structured the HMT so that the monies collected under it are "fairly apportioned" to the government's cost of providing commercial harbor maintenance services. U.S. Shoe argues, and the trial court held, that the HMT fails this prong for two primary reasons: (1)

it funds projects yet to be commenced rather than reimbursing the government for completed projects, and (2) the HMTF has accumulated a large surplus. The first objection is misplaced; the second, while troubling, is unavailing.

Regardless of the factual accuracy of U.S. Shoe's first concern,[5] when viewed in light of the purposes for which the HMT was enacted, it is of little relevance that HMT monies might fund port operations and maintenance projects not completed, or even initiated, at the time of collection. The HMT is not a short-term fix to the myriad problems that plague our nation's waterborne commerce. It is a long-term vehicle to improve and to maintain the harbors for the continuing benefit of United States commerce. Indeed, Congress expressly found that the fee will facilitate economic development. "[A] surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years." *Massachusetts*, 435 U.S. at 470 n.25 (emphasis added). The Eleventh Circuit has also recognized that user fees may be expended on future projects. In *Alamo*, it held that "given the long term nature of maintaining and developing an airport, it was appropriate ... to factor in future development plans when setting user fees." 906 F.2d at 522. Thus, it is of little moment that HMT monies are purportedly expended to fund projects not yet started rather than to repay the government for services that have already been rendered.

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[5] The First Report states that "the actual transfer of funds from the [HMTF] is for expenditures made in the previous fiscal year. In other words, FY 1990 expenditures are shown as transfers from the [HMTF] in FY 1991, and so forth. Corps expenditures are never made directly from the [HMTF], nor are transfers made on the basis of estimates or projections." First Report at 3, P 7. This indicates that FY 19xx projects are reimbursed from the HMTF with FY 19xx, or perhaps surplus, funds in FY 19xx+1.

Similarly, the fact that the HMTF enjoys, or perhaps suffers, a large surplus does not resolve whether Congress structured the HMT as a tax or a user fee. To be sure, the substantial surplus weighs against finding the HMT a user fee. But this does not, of itself, render it a tax. A closer look reveals that the HMT's structure was not ill-conceived. From 1987 through 1990, during which the HMT was only 0.04% ad valorem and paid just 40% of eligible Corps costs, revenues and expenditures were closely aligned. See First Report at 6, P 13. For example, in FY 1988, HMTF expenditures actually exceeded revenues by approximately $ 6 million, and the ending balance was just $ 9 million. *Id.*

Trouble began in 1991, when Congress increased the ad valorem rate to 0.125% in order to fund 100% of eligible Corps expenses and to reimburse the National Oceanic and Atmospheric Administration (NOAA) $ 45.5 million for its annual commercial navigation costs. While the revenue generated under the higher rate was only slightly less than projected, expenditures were considerably less, resulting in a growing HMTF surplus. Withdrawals from the HMTF were less than anticipated due primarily to (1) the absence of legislation authorizing NOAA to receive its commercial navigation costs, (2) the fact that the Corps' operations and maintenance budget was lower than had been projected in 1990 when the new ad valorem rate was established, and (3) withdrawals from the HMTF for improved administration and enforcement, while authorized, remained unappropriated. See, e.g., Second Report at 5, P 10.

The surplus has certainly burgeoned in recent years as a result of these unforeseen decreases in projected expenditures, but that does not mean that the HMT's structure shows it to be a tax. Congress is not prescient. In fact, the government recognizes that this is a problem about which something must be done. See Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994 at 7, P 16 ("The growing surplus in the HMTF remains. This can only be corrected by widening the authorized uses for HMTF monies,

or by reducing the HMF [sic] to a level consistent with its annual expenditures."). Congress has already amended the HMT statute once. There is no reason to believe that it will not correct the growing surplus. Until then, commercial users know that all HMT monies plus interest may only be expended for harbor operations and maintenance projects with commercial purposes. They may not be used for the general support of the government. See *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 371-72, 127 L. Ed. 2d 183, 114 S. Ct. 855 (1994) (declining to decide whether an airport user fee, which had accumulated "huge surpluses," was excessive under *Evansville*, in part because all fees collected had to be expended for the airport's capital or operating costs, and the airlines challenging the fee had not suggested that the surplus was being used for any purpose other than airport-related expenses); *Head Money Cases*, 112 U.S. at 596 (charges imposed on shipowners for each immigrant they brought into the United States, which were deposited into an "immigrant fund" appropriated in advance for the temporary care of passengers whom shipowners transported, was not a tax).

I would reverse the judgment of the Court of International Trade.

UNITED STATES,
PETITIONER
v.
UNITED STATES SHOE CORPORATION

No. 97-372

SUPREME COURT OF THE UNITED STATES

523 U.S. 360; 118 S. Ct. 1290; 140 L. Ed. 2d 453; 1998 U.S. LEXIS 2300; 66 U.S.L.W. 4251; 98-1 U.S. Tax Cas. (CCH) P45,325; 81 A.F.T.R.2d (RIA) 1256; 98 Cal. Daily Op. Service 2336; 98 Daily Journal DAR 3171; 11 Fla. L. Weekly Fed. S 429

March 4, 1998, Argued

March 31, 1998, Decided

PRIOR HISTORY:

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

DISPOSITION:

114 F.3d 1564, affirmed.

JUSTICE GINSBURG delivered the opinion of the Court.

The Export Clause of the Constitution states: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const., Art. I, § 9, cl. 5. We held in *United States v. International Business Machines Corp.* (*IBM*), 517 U.S. 843, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) that the Export Clause categorically bars Congress from imposing any tax on exports. The Clause, however, does not rule out a "user fee," provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for government-supplied services, facilities, or benefits. See *Pace v. Burgess*, 92 U.S. 372, 375-376, 23 L. Ed. 657 (1876). This case presents the question whether the Harbor Maintenance Tax (HMT), 26 U.S.C. § 4461(a), as applied to goods loaded at United States ports for export, is an impermissible tax on exports or, instead, a legitimate user fee. We hold, in accord with the Federal Circuit, that the tax, which is imposed on an ad valorem basis, is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee.

I.

The HMT, enacted as part of the Water Resources Development Act of 1986, 26 U.S.C. §§ 4461-4462, imposes a uniform charge on shipments of commercial cargo through the Nation's ports. The charge is currently set at 0.125 percent of the cargo's value. Exporters, importers, and domestic shippers are liable for the HMT, § 4461(c)(1), which is imposed at the time of loading for exports and unloading for other shipments, § 4461(c)(2). The HMT is collected by the Customs Service and deposited in the Harbor Maintenance Trust Fund (Fund). Congress may appropriate amounts from the Fund to pay for harbor maintenance and development projects, including costs associated with the St. Lawrence Seaway, or related expenses. § 9505.

Respondent United States Shoe Corporation (U.S. Shoe) paid the HMT for articles the company exported during the pe-

riod April to June 1994 and then filed a protest with the Customs Service alleging the unconstitutionality of the toll to the extent it applies to exports. The Customs Service responded with a form letter stating that the HMT is a statutorily mandated fee assessment on port users, not an unconstitutional tax on exports. On November 3, 1994, U.S. Shoe brought this action against the Government in the Court of International Trade (CIT). The company sought a refund on the ground that the HMT is unconstitutional as applied to exports.

Sitting as a three-judge court, the CIT held that its jurisdiction was properly invoked under 28 U.S.C. § 1581(i); on the merits, the CIT agreed with U.S. Shoe that the HMT qualifies as a tax. 907 F. Supp. 408 (1995). Rejecting the Government's characterization of the HMT as a user fee rather than a tax, the CIT reasoned: "The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo .... Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported." *Id.*, at 418. Relying on the Export Clause, the CIT entered summary judgment for U.S. Shoe.

The Court of Appeals for the Federal Circuit, sitting as a five-judge panel, affirmed. 114 F.3d 1564 (1997). On auxiliary questions, the Federal Circuit upheld the CIT's exercise of jurisdiction under § 1581(i) and agreed with the lower court that the HMT applied to goods in export transit.[1] Concluding that the HMT is not based on a fair approximation of port use, the Federal Circuit also agreed that the HMT imposes a tax, not a user fee. In making this determination, the Court of Appeals emphasized that the HMT does not depend on the amount or manner of port use, but is determined solely by the value of cargo. Judge Mayer dissented; in his view, Congress properly designed the HMT as a user fee, a toll on shippers that supplies

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[1]The Government does not here challenge the determination that the HMT applies to goods in export transit.

funds not for the general support of government, but exclusively for the facilitation of commercial navigation.

Numerous cases challenging the constitutionality of the HMT as applied to exports are currently pending in the Court of International Trade and the Court of Federal Claims.[2] We granted certiorari, 522 U.S. (1997), to review the Federal Circuit's determination that the HMT violates the Export Clause.

II.

As an initial matter, we conclude that the CIT properly entertained jurisdiction in this case. The complaint alleged exclusive original jurisdiction in that tribunal under 28 U.S.C. § 1581(a) or, alternatively, § 1581(i). App. 26. We agree with the CIT and the Federal Circuit that § 1581(i) is the applicable jurisdictional prescription. The key directive is stated in 26 U.S.C. § 4462(f)(2), which instructs that for jurisdictional purposes, the HMT "shall be treated as if such tax were a customs duty."

Section 1581(a) surely concerns customs duties. It confers exclusive original jurisdiction on the Court of International Trade in "any civil action commenced to contest the [Customs Service's] denial of a protest." A protest, as indicated in 19 U.S.C. § 1514, is an essential prerequisite when one challenges an actual Customs decision. As to the HMT, however, the Federal Circuit correctly noted that protests are not pivotal, for Customs "performs no active role," it undertakes "no analysis [or adjudication]," "issues no directives," "imposes no liabilities"; instead, Customs "merely passively collects" HMT payments. 114 F.3d at 1569.

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[2]According to the Government, some 4,000 case raising this claim are currently stayed in the CIT, with more than 100 additional cases stayed in the Court of Federal Claims. See Brief for United States 4.

Section 1581(i) describes the Court of International Trade's residual jurisdiction over

> "any civil action commenced against the United States ... that arises out of any law of the United States providing for --
>
> "(1) revenue from imports or tonnage;
>
> "(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection. ..."

This dispute, as the Federal Circuit stated, "involves the administration and enforcement' of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports." 114 F.3d at 1571. True, § 1581(i) does not use the word "exports." But that is hardly surprising in view of the Export Clause, which confines customs duties to imports. Revenue from imports and revenue from customs duties are thus synonymous in this setting. In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§]1581(i)(1)." 907 F. Supp. at 421. Accordingly, CIT jurisdiction over controversies regarding the administration and enforcement of the HMT accords with § 1581(i)(4).[3]

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[3] Because we determine that the Court of International Trade has exclusive jurisdiction over challenges to the HMT under § 1581(i)(4), it follows that the Court of Federal Claims lacks jurisdiction over the challenges to the HMT currently pending there. See 28 U.S.C. § 1491(b). The plaintiffs in these challenges may invoke § 1631, which authorizes inter-court transfers, when "in the interest of justice," to cure want of jurisdiction. See also § 610 (as used in Title 28, the term "court" includes the Court of Federal Claims and the CIT)

III.

Two Terms ago, in *IBM*, this Court considered the question whether a tax on insurance premiums paid to protect exports against loss violated the Export Clause. Distinguishing case law developed under the Commerce Clause, 517 U.S. at 850-852, and the Import-Export Clause, 517 U.S. at 857-861, the Court held that the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit. Before this Court's decision in *IBM*, the Government argued that the HMT, even if characterized as a "tax" rather than a "user fee," should survive constitutional review "because it applies without discrimination to exports, imports and domestic commerce alike." Reply Brief for United States 9, n. 2. Recognizing that *IBM* "rejected an indistinguishable contention," the Government now asserts only that HMT is "'a permissible user fee,'" *ibid.*, a toll within the tolerance of Export Clause precedent. Adhering to the Court's reasoning in *IBM*, we reject the Government's current position.

The HMT bears the indicia of a tax. Congress expressly described it as "a *tax* on any port use," 26 U.S.C. § 4461(a) (emphasis added), and codified the HMT as part of the Internal Revenue Code. In like vein, Congress provided that, for administrative, enforcement, and jurisdictional purposes, the HMT should be treated "as if [it] were a customs duty." §§ 4462(f)(1),(2). However, "we must regard things rather than names," *Pace v. Burgess*, 92 U.S. at 376, in determining whether an imposition on exports ranks as a tax. The crucial question is whether the HMT is a tax on exports in operation as well as nomenclature or whether, despite the label Congress has put on it, the exaction is instead a bona fide user fee.

In arguing that the HMT constitutes a user fee, the Government relies on our decisions in *United States v. Sperry Corp.*, 493 U.S. 52, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989), *Massachusetts v. United States*, 435 U.S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978), and *Evansville-Vanderburgh Air-*

port Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972). In those cases, this Court upheld flat and ad valorem charges as valid user fees. See *United States v. Sperry Corp.*, 493 U.S. at 62 (1 1/2 percent ad valorem fee applied to awards certified by the Iran-United States Claims Tribunal qualifies as a user fee and is not so excessive as to violate the Takings Clause); *Massachusetts v. United States*, 435 U.S. at 463-467 (flat federal registration fee imposed annually on all civil aircraft meets genuine user fee standards and, as applied to state-owned aircraft, does not dishonor State's immunity from federal taxation); *Evansville-Vanderburgh Airport Authority*, 405 U.S. at 717-721 (flat charge for each passenger enplaning, levied for the maintenance of State's airport facilities, does not run afoul of the dormant Commerce Clause). Those decisions involved constitutional provisions other than the Export Clause, however, and thus do not govern here.

IBM plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority. The Court there emphasized that the "text of the Export Clause ... expressly prohibits Congress from laying any tax or duty on exports." 517 U.S. at 852; see also *id.*, at 861 ("The Framers sought to alleviate ... concerns [that Northern States would tax exports to the disadvantage of Southern States] by completely denying to Congress the power to tax exports at all."). Accordingly, the Court reasoned in *IBM*, "our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid." 517 U.S. at 851; see also 517 U.S. at 857 ("We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. ... Meaningful textual differences exist [between the two Clauses] and should not be overlooked."). In *Sperry*, moreover, we noted that the Takings

Clause imposes fewer constraints on user fees than does the dormant Commerce Clause. See 493 U.S. at 61, n. 7 (analysis under Takings Clause is less "exacting" than under the dormant Commerce Clause). *A fortiori*, therefore, the Takings Clause is less restrictive than the Export Clause.

The guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context remains our time-tested decision in *Pace*. *Pace* involved a federal excise tax on tobacco. Congress provided that the tax would not apply to tobacco intended for export. To prevent fraud, however, Congress required that tobacco the manufacturer planned to export carry a stamp indicating that intention. Each stamp cost 25 cents (later 10 cents) per package of tobacco. Congress did not limit the quantity or value of the tobacco packaged for export or the size of the stamped package; "these were unlimited, except by the description of the exporter or the convenience of handling." 92 U.S. at 375.

The Court upheld the charge, concluding that it was "in no sense a duty on exportation," but rather "compensation given for services [in fact] rendered." *Ibid.* In so ruling, the Court emphasized two characteristics of the charge: It "bore no proportion whatever to the quantity or value of the package on which [the stamp] was affixed"; and the fee was not excessive, taking into account the cost of arrangements needed both "to give to the exporter the benefit of exemption from taxation, and ... to secure ... against the perpetration of fraud." *Ibid.*

Pace establishes that, under the Export Clause, the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here. Unlike the stamp charge in *Pace*, the HMT is determined entirely on an ad valorem basis. The value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter. As the Federal Circuit noted, the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time

it spends in port, and the services it requires, for instance, harbor dredging. See 114 F.3d at 1572.

In sum, if we are "to guard against ... the imposition of a [tax] under the pretext of fixing a fee," *Pace v. Burgess*, 92 U.S. at 376, and resist erosion of the Court's decision in *IBM*, we must hold that the HMT violates the Export Clause as applied to exports. This does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance. It does mean, however, that such a fee must fairly match the exporters' use of port services and facilities.

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For the foregoing reasons, the judgment of the Court of Appeals for the Federal Circuit is

Affirmed.

UNITED STATES SHOE CORPORATION,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

Court No. 94-11-00668

UNITED STATES COURT OF INTERNATIONAL TRADE

22 C.I.T. 613; 1998 Ct. Intl. Trade LEXIS 76; SLIP OP. 98-88

June 26, 1998, Dated

DISPOSITION:

Slip Op. 96-32 readopted as the opinion of the court on the issue of interest.

JUDGES:

BEFORE: HON. JANE A. RESTANI, JUDGE.

OPINION BY:

JANE A. RESTANI

OPINION:

JUDGMENT

Upon consideration of Plaintiff's Motion for an Order Settling Interest and Costs, defendant's response thereto, and all other proceedings had herein; and

WHEREAS, a three-judge panel of this Court entered a judgment for plaintiff on December 4, 1995, declaring the Harbor Maintenance Tax as imposed upon merchandise exported from the United States to be unconstitutional, enjoining the United States Customs Service from the assessment and collection of the Harbor Maintenance Tax in connection with merchandise exported from the United States, and awarding plaintiff a money judgment in the amount of $8,281.87, together with interest and costs as provided by law; and

WHEREAS this Court determined in Slip Op. 96-32 (February 7, 1996) that plaintiff is entitled to interest on the money judgment awarded in this case, pursuant to 28 U.S.C. § 2411; and

WHEREAS at the time the Court issued Slip Op. 96-32, the Government already had noticed an appeal of this case on February 1, 1996, and Slip Op. 96-32 specifically notes that "notice of appeal has been filed and the court lacks jurisdiction to alter the judgment;" and

WHEREAS the December 4, 1995 judgment of the Court in this case was affirmed by the United States Court of Appeals for the Federal Circuit on June 3, 1997, in *United States Shoe Corp.* v. *United States*, 114 F.3d 1564 (Fed. Cir. 1997); and

WHEREAS the decision of the United States Court of Appeals for the Federal Circuit in United States Shoe Corp. v. United States was affirmed by the Supreme Court of the United States on March 31, 1998, in *United States v. United States*

Shoe Corp., 140 L. Ed. 2d 453, 118 S. Ct. 1290 (1988), which decision is now final; and

WHEREAS the stay of execution of the money judgment awarded to plaintiff and the effect of the declaratory and injunctive relief, ordered by the Court on December 4, 1995, by its terms automatically dissolved upon "the conclusion of any appellate proceedings"; and

WHEREAS defendant expressly reserves any right remaining to appeal the award of interest or any costs in this case;

WHEREAS, the court has previously determined that costs shall be awarded as provided by law, the court has discretion to award costs, and plaintiff pursued diligently this test case of minor principal value; it is hereby

(1) ORDERED that further briefing is not required and Slip Op. 96-32 is hereby readopted as the opinion of the court on the issue of interest.

(2) ORDERED that defendant pay plaintiff the principal amount owing of $ 8,281.87 within 60 days hereof;

(3) ORDERED that defendant pay plaintiff $ 403.63 in costs within 60 days hereof;

(4) ORDERED that defendant pay plaintiff interest on the aforementioned $ 8,821.87 principal, calculated under 28 U.S.C. § 2411, and that the payment obligation is stayed until 30 days after the time for appeal expires or appellate proceedings are complete.

Jane A. Restani

JUDGE

Dated: New York, New York

This 26th day of June, 1998.

UNITED STATES SHOE CORPORATION,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

98-1574

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2002 U.S. App. LEXIS 23176

October 22, 2002, Decided

October 22, 2002, Filed

PRIOR HISTORY:

United States Shoe Corp. v. United States, 296 F.3d 1378, 2002 U.S. App. LEXIS 14776 (Fed. Cir. 2002)

OPINION:

ORDER

A petition for rehearing en banc having been filed by the APPELLEE, and the response thereto having been invited by the court and filed by the APPELLANT *, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 29, 2002.

* Arbon Steel & Service Co., Inc. filed an amicus curiae brief.

Dated: October 22, 2002

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

98-1590

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

201 F.3d 1367; 2000 U.S. App. LEXIS 681; 2000-1 U.S. Tax Cas. (CCH) P70,134; 85 A.F.T.R.2d (RIA) 518

January 19, 2000, Decided

SUBSEQUENT HISTORY:

As Corrected February 2, 2000. As Amended May 8, 2000. Rehearing and Rehearing En Banc Denied May 31, 2000, Reported at: *2000 U.S. App. LEXIS 15299*. Court Correction of June 9, 2000 Received after F. 3d Cite Availability. Reported at: *2000 U.S. App. LEXIS 22370*. Certiorari Denied February 20, 2001, Reported at: *2001 U.S. LEXIS 1685*.

PRIOR HISTORY:

Appealed from: U.S. Court of International Trade. Judge Jane A. Restani.

DISPOSITION:

REVERSED.

COUNSEL:

William D. Outman, II, Baker & McKenzie, of Washington, DC, argued for plaintiff-appellee. With him on the brief were Kevin M. O'Brien, Teresa A. Gleason, and Michael E. Murphy.

Lara Levinson, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant-appellant. With her on the brief were David W. Ogden, Acting Assistant Attorney General, David M. Cohen, Director, Jeanne E. Davidson, Deputy Director, and Todd M. Hughes, Attorney. Of counsel on the brief was Richard McManus, Office of the Chief Counsel, United States Customs Service, of Washington, DC.

Patrick D. Gill, Rode & Qualey, of New York, New York, for amicus curiae Capital-Mercury Shirt Corp. Melvin S. Schwechter, LeBoeuf, Lamb, Greene & MacRae, L.L.P., of Washington, DC, for amicus curiae Rapid Industrial Plastics Co. Inc. Steven H. Becker, Coudert Brothers, of New York, New York, for amicus curiae Alfred C. Toepfer International, Inc. Peter Jay Baskin, Sharretts, Paley, Carter & Blauvelt, P.C., of New York, New York, for amicus **[**2]** curiae Bunge Corporation. Steven P. Florsheim, Grunfeld, Desiderio Leibowitz & Silverman LLP, of New York, New York for amicus curiae Mondial International Corp. Munford Page Hall, II, Dorsey & Whitney, LLP, of Washington, DC, for amicus curiae New Holland North America, Inc. Barry E. Cohen, Crowell & Moring, LLP, of Washington, DC for amicus curiae Elliott Turbomachinery Company. Brian S. Goldstein, Graham & James, LLP, of New York, New York, for amici curiae AgrEvo USA Company and Nor-Am Chemical Company. Gilbert Lee Sandler, Sandler, Travis & Rosenberg, P.A., of Miami, Florida, for amicus

curiae Oshkosh B'Gosh, Inc. James S. O'Kelly, Barnes, Richardson & Colburn, of New York, New York, for amicus curiae Firmenich, Inc.; of counsel was Christopher E. Pey. Mark Stuart Zolno, Katten, Muchin & Zavis, of Chicago, Illinois, for amicus curiae Perseco Asia-Pacific, L.P.

Leslie Alan Glick, Porter, Wright, Morris & Arthur, of Washington, DC, for amici curiae CombiBloc, Inc., Carter-Wallace, Inc., Allied Mineral, Inc., Techneglas, Inc., and Diehl, Inc.

Jerry P. Wiskin, Simons & Wiskin, of New York, New York, for amicus curiae Cam USA, Inc.

JUDGES:

Before PLAGER, CLEVENGER, and RADER, Circuit Judges.

OPINION BY:

PLAGER

OPINION:

PLAGER, Circuit Judge.

The United States ("the Government") appeals a judgment of the United States Court of International Trade, which awarded interest on refunds of the Harbor Maintenance Tax ("HMT"). The Supreme Court had earlier held that the HMT, as applied to exports, violates the Export Clause of the United States Constitution, and cannot be lawfully collected.[1] This

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[1] *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998).

case was filed to test whether the Government is obligated by law to pay interest on these refunds.

The Court of International Trade held that appellee may recover interest on refunds of HMT payments resulting from the Supreme Court's decision.[2] The trial court adjudged that 28 U.S.C. § 2411, which provides for post-payment interest on tax refunds, applies.[3] We conclude that neither § 2411 nor any other statutory provision provides the necessary authorization for an award of interest to appellee on its HMT refunds. The judgment of the trial court is reversed.

BACKGROUND

The HMT, enacted by Congress as part of the Water Resources Development Act of 1986, 26 U.S.C. § 4461-62 (1994), is an ad valorem tax imposed on shipments of commercial cargo which pass through the country's ports. Several thousand exporters challenged the constitutionality of the HMT as applied to exporters. In a test case, a three-judge panel of the Court of International Trade held that the HMT violates the Export Clause of the United States Constitution. See *United States Shoe Corp. v. United States*, 19 C.I.T. 1284, 907 F. Supp. 408 (1995). This decision was affirmed by a five-judge panel of this court, see *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), which decision was affirmed by the Supreme Court, see *United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998).

In the course of the initial litigation before the Court of International Trade, that court issued an Order declaring that the

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[2] *IBM v. United States,* 1998 Ct. Intl. Trade LEXIS 73, No. 94-10-00625, 1998 WL 325156 (Ct. Int'l Trade June 17, 1998).

[3] All references to the United States Code are to the 1994 edition unless otherwise indicated.

plaintiff was entitled to a refund "together with interest and costs as provided by law." *United States Shoe Corp. v. United States*, 19 C.I.T. 1413, 924 F. Supp. 1191, 1191 (Ct. Int'l Trade 1995). Subsequently the court determined that the question of interest on the refund judgment "is not a matter without controversy and it cannot be resolved as a simple clerical matter." *U.S. Shoe*, 20 Ct. Int'l Trade 206, 207 (1996). The Court of International Trade called for briefing on the issue of whether the exporters may recover interest. However, before the court issued its decision on the question of plaintiff's entitlement to interest, the Government filed a notice of appeal from the court's earlier decision on the constitutional issue. Thus, the interest issue was not addressed during the appellate proceedings that followed.

While the appeal of the constitutional issue was proceeding, the Court of International Trade decided the question of whether the exporters were entitled to interest on their refunds. The court acknowledged that the United States is immune from paying interest absent express congressional consent, citing *Library of Congress v. Shaw*, 478 U.S. 310, 314, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986). See *U.S. Shoe*, 20 Ct. Int'l Trade at 207. The court found the necessary express authorization with regard to HMT refunds in 28 U.S.C. § 2411, which provides that "in any judgment of any court rendered (... against the United States ...) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment ...." *U.S. Shoe*, 20 Ct. Int'l Trade at 207-08.

After the Supreme Court affirmed the unconstitutionality of the HMT as applied to exports, the Court of International Trade designated this case as a companion test case to U.S. Shoe to give the Government the opportunity to appeal the award of interest. See *IBM*, 1998 WL 325156, at *1. The Court of International Trade deemed filed in this case the briefs concerning the issue of interest filed in the U.S. Shoe proceedings as well

as its 1996 U.S. Shoe opinion awarding interest. See *id.* This appeal followed.

DISCUSSION

The issue of whether Congress has expressly authorized interest on HMT refunds is one of statutory interpretation, a question of law that we review independently and without deference to the trial court. See *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (questions of law subject to full and independent review). The oft-repeated general principle is that the United States is immune to claims for interest unless Congress has waived immunity by expressly consenting to an award of interest. See *Shaw*, 478 U.S. at 314. Congressional consent must be unambiguous. See *id.* at 318.

The HMT statutory provisions are relatively brief, and are codified in two sections, numbered 4461 and 4462, as "Subchapter A--Harbor Maintenance Tax" in Chapter 36-Certain Other Excise Taxes, as part of Title 26-Internal Revenue Code. Section 4461 imposes the tax, and section 4462 provides definitions and special rules. Nothing in Subchapter A expressly addresses the question of whether in a refund of taxes paid thereunder, the payor is entitled to interest on the refund. The only provisions of Subchapter A that bear on the question are found in two paragraphs in subsection 4462(f), entitled "Extension of provisions of law applicable to customs duty."

Paragraph (1) of subsection (f) states: "Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter ...." Paragraph (3) states: "The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." (Subtitle F of Title 26 deals with the procedure and administration of the internal revenue system.)

It appears abundantly clear from these provisions that, even though the HMT is codified as an excise tax and is part of the Internal Revenue Code ("IRC"), Congress intended the administration and enforcement of the tax to be treated as if the tax was a customs duty, and not a tax under the IRC.

Because the statutory provisions which established the HMT do not explicitly authorize interest payments on refunds of the tax, if Congress authorized such payments the authorizing statute must be found elsewhere. And if such a statute is found, we must determine whether Congress by the provisions of subsection (f) quoted above has precluded its application to an HMT refund. We have been urged to look at several possible sources for the authorization; we shall examine each in turn.

1.

Subtitle F of Title 26, the Internal Revenue Code, in § 6611(a), states that "interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621." This provision of the Code cannot apply because the HMT statute, § 4462(f)(3), specifically exempts the HMT from all provisions in subtitle F of Title 26: "the [HMT tax] shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Thus, any Congressional authorization of interest payments on HMT refunds must be found outside of subtitle F.

The Court of International Trade found the necessary express authorization for interest payments in another Title of the United States Code, namely Title 28, which is entitled "Judiciary and Judicial Procedure." 28 U.S.C. § 2411 provides, in relevant part, that "in any judgment of any court rendered (... against the United States ...) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment ...."

In its analysis of § 2411, the Court of International Trade first determined that the HMT is an internal revenue tax within the meaning of § 2411. See *U.S. Shoe*, 20 Ct. Int'l Trade at 208. The court then considered whether the two paragraphs of the HMT statute quoted above precluded application of § 2411 to HMT refunds. The court concluded that the HMT refund process would not constitute either "administration" or "enforcement" of the HMT, and that the HMT statute did not exempt HMT refunds from application of § 2411. See *U.S. Shoe*, 20 Ct. Int'l Trade at 208-09.

For purposes of analysis, we accept the argument of appellee and the holding of the Court of International Trade that payment of the HMT by exporters is an "internal revenue tax" within the meaning of § 2411. Because Congress codified the HMT as part of Title 26 of the United States Code, entitled "Internal Revenue Code," we may reasonably conclude that Congress considered the HMT to be an internal revenue tax. Furthermore, while it may be true that the constitutionality of the HMT was challenged because the HMT taxed goods exported out of the United States, the HMT is clearly derived from internal sources--the U.S. exporter--rather than external sources--the foreign recipient; HMT revenues were collected in the United States from domestic companies based on their use of ports and harbors in this country. Thus both the structure and the content of the HMT point toward it being an internal revenue tax, and thus entitled on refund to the interest award provided under § 2411.

Furthermore, we accept appellee's contention that the language of § 2411 is broad enough, and has been so construed, as to cover the case before us. The question, then, is whether the express provisions of the HMT statute preclude application of § 2411 to refunds of the tax. As previously noted, the HMT statute in subsection (f) of § 4462 directs that "the [HMT] shall not be treated as a tax for purposes of subtitle F *or any other provision of law relating to the administration and enforcement of internal revenue taxes*." 26 U.S.C. § 4462(f)(3) (emphasis

added). If the refund process for the unconstitutionally-levied HMT is not related to the "administration and enforcement" of an internal revenue tax, then § 2411 of Title 28 would appear to be ample authorization for interest to be paid on the refund. If, however, the refund process for this internal revenue tax relates to its administration and enforcement, the plain language of the HMT statute would bar the use of § 2411 as a statutory basis for an award of interest on HMT refunds.

This is a question of statutory interpretation. We begin with the language of the statute itself. If that language is clear and unambiguous, then it controls, and we need not--indeed we may not--go further. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 *(1989))); Muwwakkil v. Office of Personnel Management*, 18 F.3d 921, 924 (Fed. Cir. 1994) ("When statutory interpretation is at issue, the plain and unambiguous meaning of a statute prevails."). To determine whether the statutory language is plain and unambiguous, we look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341.

Because the HMT statute does not define "administration and enforcement," we assume that the terms have their ordinary meaning, for which we may consult a dictionary. See *Best Power Tech. Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation ... that undefined terms in a statute are deemed to have their ordinarily understood meaning. For that meaning, we look to the dictionary.") (citations omitted). Black's Law Dictionary defines "administer" as "to manage or conduct." Black's Law Dic-

tionary 44 (6th ed. 1990). "Enforce" is defined as "to put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to." *Id.* at 528.

Applying these definitions to the HMT statute, we read "administration and enforcement of internal revenue taxes" broadly to encompass not only management of the tax system, including the assessment and collection of tax payments and issuance of refunds and interest on those refunds by the agency responsible, but also enforcement of the tax laws, including the obtaining and enforcement of judgments against both taxpayers and the United States. Nothing in the language of the statute limits "administration and enforcement" to the narrow interpretation applied by the Court of International Trade, i.e., "matters of routine administration and enforcement by an agency." *U.S. Shoe*, 20 Ct. Int'l Trade at 208.

Examination of the phrase "administration and enforcement" in the context of 26 U.S.C. § 4462(f)(3) supports this broader interpretation. Again, that paragraph of the statute exempts the HMT from "subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Subtitle F of the Internal Revenue Code is entitled "Procedure and Administration." In addition to chapters addressing agency responsibilities such as "Assessment" (chapter 63), "Collection" (chapter 64), and "Abatements, credits, and refunds" (chapter 65), subtitle F includes a chapter on "Judicial proceedings" (chapter 76). That chapter includes provisions regarding civil actions by the United States (subchapter A), proceedings by taxpayers and third parties (subchapter B), the Tax Court (subchapter C), and court review of Tax Court decisions (subchapter D).

A fair reading of the phrase "subtitle F or any other provision of law" as used by Congress in the HMT statute would thus include both the administrative and judicial processes as activities that relate to the "administration and enforcement" of

taxes. Furthermore, interest on a tax refund would seem to be expressly included in those activities, since subtitle F itself contains a provision for interest on tax refunds, 26 U.S.C. § 6611(a). Accordingly, we are forced to conclude that Congress intended the phrase "administration and enforcement" to encompass not only agency action, but also judicial enforcement of the tax laws, including a judicial award of interest on tax refunds.

This interpretation is consistent with the other paragraph of subsection (f) of the HMT statute, § 4462(f)(1), quoted above, which provides that "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] as if such tax were a customs duty." The Tariff Act of 1930, codified in the United States Code in Chapter 4 of Title 19, entitled "Customs Duties," provides for the administration and enforcement of customs duties in Subtitle III, entitled "Administrative Provisions." As discussed below, that subtitle includes a provision for interest on refunds of customs duties. See 19 U.S.C. § 1505.

Section 4462(f)(3) is complementary to § 4462(f)(1), i.e., the administration and enforcement provisions relating to tax laws cannot apply to the HMT, see § 4462(f)(3), because the administration and enforcement provisions of the customs laws do apply to the HMT, see § 4462(f)(1). Accordingly, because an interest provision such as 19 U.S.C. § 1505(c) is an administrative and enforcement provision of the customs laws, the section of Title 28, § 2411, which provides for interest on tax refunds, is a "provision of law relating to the administration and enforcement of internal revenue taxes" within the meaning of 26 U.S.C. § 4462(f)(3) and cannot apply to the HMT.

Although it is unnecessary to consider the legislative history because the statutory language is clear from the language itself and its context, we note that the legislative history does not contradict the plain meaning of the HMT statute. The Senate Finance Committee report, cited by the Court of International Trade, states that it is more appropriate for the Customs

Service, rather than the Internal Revenue Service, to collect and administer the HMT because the Customs Service has a strong presence at ports of entry and experience at appraising merchandise. See S. Rep. No. 99-228, *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714. In order to facilitate the administration of the HMT by Customs, the report explains, the statute provides that all administrative and enforcement provisions of the customs law and regulations apply to the HMT as if it were a customs duty. See *id.* at 6714-15.

Though nothing in the legislative history defines the phrase "administration and enforcement," and the report is silent on the issue of whether a provision for interest on refunds relates to administration and enforcement, the legislative history confirms that § 4462(f)(3) was enacted as a counterpart to § 4462(f)(1) so that the administrative and enforcement provisions of only the customs statutes, and not the tax laws, would apply to the HMT. See *id.* at 6715. As noted above, the administrative provisions of the customs laws include interest provisions. Because Congress did not specifically exclude interest provisions from "administrative and enforcement provisions" with respect to § 4462(f)(1), we must conclude that the interest provisions of the customs laws, and not the tax laws, apply to the HMT.

2.

Having concluded that the HMT is to be treated as a customs duty for administrative and enforcement purposes, we look to the customs statutes for an express authorization of interest. Two provisions, 28 U.S.C. § 2644 and 19 U.S.C. § 1505(c), were raised before the Court of International Trade and by amici on appeal. We agree with the Court of International Trade that these customs provisions do not provide for interest on HMT refunds on the facts of this case. See *U.S. Shoe*, 20 Ct. Int'l Trade at 208-09.

28 U.S.C. § 2644 permits a judicial award of interest upon a judgment in a civil action brought pursuant to 19 U.S.C. § 1515

to contest the denial of an administrative protest. Appellee, however, did not pursue a refund of HMT payments through a customs protest. Indeed, in the earlier test case, the Court of International Trade had jurisdiction over the constitutional challenge to the HMT under 28 U.S.C. § 1581(i), the residual jurisdiction provision, and not under 28 U.S.C. § 1581(a), the provision that gives the Court of International Trade jurisdiction over actions filed under 19 U.S.C. § 1515. See *U.S. Shoe*, 523 U.S. at 366. Because appellee did not file an administrative protest and did not contest the denial of such a protest, appellee is not entitled to interest under 28 U.S.C. § 2644.

The customs laws also provide for pre-judgment interest on certain excess duties paid to Customs. Specifically, "interest on excess moneys deposited shall accrue ... from the date the *importer of record* deposits estimated duties, fees and interest ... to the date of *liquidation or reliquidation* of the applicable *entry* or reconciliation." 19 U.S.C. § 1505(c) (emphasis added); see also 19 U.S.C. § 1520(d) (1988) (repealed 1993) (authorizing interest "if a determination is made to reliquidate an entry"). On its face, the statute contemplates an entirely different factual scenario from the one before us. However, amici suggest that by substituting the exporter for the "importer of record," the HMT quarterly report for the "entry," and Customs' acceptance of the HMT payment for "liquidation," we can apply § 1505(c) to provide interest on HMT refunds. We are without power to rewrite a Congressional enactment to make it fit a case for which it was clearly not intended, no matter how compelling the case, particularly in light of the Supreme Court's mandate that Congress must expressly consent to an award of interest. See *Shaw*, 478 U.S. at 314. Accordingly, § 1505(c) does not authorize interest on HMT refunds.

In sum, we are bound by the rule that the United States is liable for interest only if Congress has waived sovereign immunity by expressly consenting to an award of interest. Section 4462(f) provides that the HMT is to be treated as a customs duty, and not as a tax, for purposes of statutory provisions relat-

ing to administration and enforcement. Because § 2411, the provision on which appellee and the trial court relied, is a provision of law relating to the administration and enforcement of taxes, the HMT statute precludes the application of § 2411 to provide interest on refunds of the HMT. Furthermore, the statutory provisions of the customs laws dealing with interest on refunds do not entitle this appellee, on these facts, to interest on HMT refunds.

Congress has waived sovereign immunity in both the tax code and the customs laws to permit interest to be paid on certain refunds to allow for the time value of money when the Government has had the use for a period of time of money to which it is not lawfully entitled. Congress has considered this to be only fair and proper. In the case before us, appellee makes a case for equal treatment. After thorough consideration, however, we are unable to find in the existing statutory framework, nor has any been cited to us, the necessary Congressional purpose to provide for interest on these particular refunds under the HMT. If relief for these taxpayers is to be granted, Congress must grant it.

CONCLUSION

The judgment of the Court of International Trade must be, and is,

REVERSED.

COSTS

Each party shall bear its own costs.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. CONST. art. I, § 9, cl. 5

> No Tax or Duty shall be laid on articles exported from any State.

U.S. CONST. amend. 5

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

19 U.S.C. 1505(b)

> Collection or refund of duties, fees, and interest due upon liquidation or reliquidation. The Customs Service shall * * * refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation.

19 U.S.C. 1505(c)

> Interest. Interest on excess moneys deposited shall accrue * * * from the date the importer of record deposits estimated dues, fees, and interest * * * to the date of liquidation or reliquidation of the applicable entry or reconciliation.

26 U.S.C. 4462(f)(1)

> Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the

[HMT] (and in respect of persons liable therefor) as if such tax were a customs duty.

26 U.S.C. 4462(f)(3)

The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.

26 U.S.C. 6611

Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

28 U.S.C. 1581

(a) The Court of International Trade Shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

* * *

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. 1961(a)

Interest shall be allowed on any money judgment in a civil case recovered in a district court.

28 U.S.C. 1961(c)(1)

This section [i.e., Section 1961] shall not apply in any judgment of any court with respect to any internal revenue tax case.

28 U.S.C. 1961(c)(2)

[I]nterest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit.

28 U.S.C. 2411

In any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed.

28 U.S.C. 2644

If, in a civil action in the Court of International Trade under [19 U.S.C. 1515], the plaintiff obtains monetary

relief by a judgment or under a stipulation agreement, interest shall be allowed * * *. Such interest shall be calculated from the date of the filing of the summons in such action to the date of the refund.

19 C.F.R. 24.24

(a) Fee. Commercial cargo loaded on or unloaded from a commercial vessel is subject to a port use fee of 0.125 percent (.00125) of its value * * *.

* * *

(e) Collections, supplemental payments, and refunds –

(4) Refunds and supplemental payments -- (i) General. To make supplemental payments or seek refunds of harbor maintenance fees paid relative to the unloading of imported cargo, the procedures applicable to supplemental payments or refunds of ordinary duties must be followed. To seek refunds of quarterly-paid harbor maintenance fees pertaining to export movements, the procedures set forth in paragraph (e)(4)(iv) of this section must be followed. To make supplemental payments on any quarterly-paid harbor maintenance fee or seek refunds of quarterly-paid harbor maintenance fees pertaining to other than export movements, the procedures set forth in paragraph (e)(4)(iii) must be followed.

* * *

(ii) Time limit for refund requests. A refund request must be received by Customs within one year of the date the fee for which the refund is sought was paid to Customs or, in the case of fees paid relative to imported merchandise admitted into a foreign trade zone and subsequently withdrawn from the zone under 19 U.S.C. 1309, within one year of the date of withdrawal from the zone.

(iii) For fees paid on other than export movements. If a supplemental payment is made for any quarterly-paid harbor maintenance fee or a refund is requested relative to quarterly fee payments previously made regarding the loading or unloading of domestic cargo, the unloading of cargo destined for admission into a foreign trade zone, or the boarding or disembarking of passengers, the refund request or supplemental payment must be accompanied by a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, along with a copy of the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) covering the payment to which the refund request or supplemental payment relates. A request for a refund must specify the grounds for the refund.

(iv) For fees paid on export movements. Customs will process refund requests relative to fee payments previously made regarding the loading of cargo for export as follows:

(A) Refund request. For export fee payments made prior to July 1, 1990, the exporter (the name that appears on the SED or equivalent documentation authorized under 15 CFR 30.39(b)) or its agent must submit a letter of request for a refund specifying the grounds for the refund and identifying the specific payments made. The letter must be accompanied by the proof of payment set forth in paragraph (e)(4)(iv)(C) of this section. For export fee payments made on or after July 1, 1990, supporting documentation is not required with the refund request. For these payments, the request must specify the grounds for the refund, identify the quarters for which a refund is sought, and contain the following additional information: the exporter's name, address, and employer identification number (EIN); the name and EIN of any freight forwarder or other agent that made export fee payments on the exporter's behalf; and a name, telephone number, and facsimile number of a contact person.

(B) Refund procedure -- (1) Processing order; power of attorney. Generally, a properly filed refund request will be processed in the chronological order of its receipt. A refund request filed on behalf of an exporter by an agent other than a freight forwarder must be supported by a power of attorney or letter signed by the exporter authorizing the representation. A refund request filed by an agent other than a freight forwarder that lacks a power of attorney or authorization letter will not be processed unless one or the other is submitted. A refund request filed by a freight forwarder does not require a power of attorney or authorization letter to be processed; however, if Customs has not received a power of attorney or authorization letter for an exporter covered in a freight forwarder's refund request and that exporter has filed a separate refund request on its own behalf, that freight forwarder's entire refund request will be removed from the chronological processing order and processed after the processing of all exporter refund requests is completed.

(2) HMT Payment Report and Report/Certification. In processing a request for a refund, Customs will conduct a search of its records (Customs electronic database and paper document sources) and produce for issuance to the exporter (or its agent, as appropriate) a "Harbor Maintenance Tax Payment Report" (HMT Payment Report) that lists all payments reflected in those records for the entire period the fee was in effect. Customs will also produce for issuance to the exporter a "Harbor Maintenance Tax Refund Report and Certification" (Report/Certification) that lists all payments supported by paper documentation, either retained by Customs (relative to payments made on and after July 1, 1990) or submitted by the exporter with its refund request (relative to payments made at any time the fee was in effect). Where a refund request was filed on the exporter's behalf by an agent other than a freight forwarder, a power of attorney or authorization letter must be filed with Customs be-

fore Customs will issue these reports. The Report/Certification sets forth the total amount of the refund that Customs believes it owes the exporter for the payments listed in that report (minus any previous refunds). Pre-July 1, 1990, payments listed in the HMT Payment Report for which paper documentation has not been provided by the exporter will not be listed in the Report/Certification. The exporter has 120 days from the date the HMT Payment Report and the Report/Certification are issued (the 120-day period) to sign and return to Customs the Report/Certification in order to receive the refund set forth in that report and/or to submit to Customs a request for a Revised Report/Certification. Where the exporter chooses to receive the refund set forth in the Report/Certification, the exporter must sign and return the report to Customs. Customs will issue the refund upon receipt of the signed report.

(3) Revised Report/Certification. A request for a Revised Report/Certification must be accompanied by documentation to support any payments not listed in the Report/Certification or corrections to listed payments. See paragraph (e)(4)(iv)(C) of this section regarding acceptable documentation. If an exporter (or its agent, as appropriate) both signs and returns to Customs a Report/Certification and requests a Revised Report/Certification, Customs will not, when reviewing the request for a Revised Report/Certification, approve for refund any corrections to the payments that were listed in the signed Report/Certification; Customs will, however, in that circumstance, consider approving any additional payments that were not listed in the signed Report/Certification. If an exporter does not sign and return to Customs a Report/Certification, but requests a Revised Report/Certification, Customs will consider approving for refund corrections to the payments listed in the Report/Certification and additional payments. Where the exporter requests a Revised Report/Certification, Customs

will review the documentation submitted with the request, make a determination, and, within 60 days of the request's receipt, issue a Revised Report/Certification that lists all payments approved for refund and the total amount of the refund owed. In order to receive the refund set forth in a Revised Report/Certification, the exporter must sign and return it to Customs. Customs will issue the refund upon its receipt of the signed report. An exporter, within the 120-day period, may submit additional requests for a Revised Report/Certification, with appropriate documentation, to cover any payments not approved for refund in a Revised Report/Certification previously issued by Customs.

(4) Protest. For purposes of filing a protest under 19 U.S.C. 1514 (and 19 CFR part 174), unless issuance of a Revised Report/Certification is pending, any payments not approved for refund in a Report/Certification or a Revised Report/Certification issued by Customs within the 120-day period will be considered denied as of the date the period expires; a protest covering such payments must be filed within 90 days of that date. For any payments not approved for refund in a Revised Report/Certification issued after expiration of the 120-day period, a protest may be filed within 90 days of that report's issuance.

(5) Significance of signed Report/Certification and Revised Report/Certification. A Report/Certification or Revised Report/Certification must be signed by an officer of the company duly authorized to bind the company or by an agent (such as a broker or freight forwarder) representing the exporter in seeking a refund under this section. A Report/Certification or Revised Report/Certification signed by the exporter or its agent and received by Customs constitutes the exporter's agreement that the amount of the refund set forth in the report is accurate and Customs payment of that refund amount is in full accord and satisfaction of all payments approved for refund in the report. The signed Report/Certification or Revised Report/Certification also rep-

represents the exporter's release, waiver, and abandonment of all claims, excluding claims for interest, against the Government, its officers, agents, and assigns for costs, attorney fees, expenses, compensatory damages, and exemplary damages arising out of the payments approved for refund in the report. When an agent, including a freight forwarder, signs a Report/Certification or Revised Report/ Certification on behalf of an exporter(s), the agent certifies that it is acting on the exporter's behalf and will use due diligence to forward the refund to the exporter, and, in the event the agent does not forward the refund to the exporter, will notify Customs and return the refund to Customs within one year of its receipt of the refund. Upon receipt of the signed Report/Certification or Revised Report/Certification, Customs releases, waives, and abandons all claims other than fraud against the exporter, its officers, agents, or employees arising out of all payments approved for refund in the report.

(C) Documentation. For payments made prior to July 1, 1990, supporting documentation is required to obtain a refund and must be submitted in accordance with paragraphs (e)(4)(iv)(A) and/or (B)(3) of this section. For payments made on and after July 1, 1990, supporting documentation is not required to obtain a refund, unless the exporter seeks to prove corrections of payments listed in the Report/Certification (if the exporter did not sign and return it to Customs) and/or additional payments not listed in a Report/Certification, in accordance with paragraph (e)(4)(iv)(B)(3) of this section. The supporting documentation that Customs will accept as establishing entitlement to a refund, whether submitted with a refund request or a request for a Revised Report/Certification, is whichever of the following documents Customs accepted with the payment at the time it was made: a copy of the Export Vessel Movement Summary Sheet; where an Automated Summary Monthly Shipper's Export Declaration was filed, a copy of a

letter containing the exporter's identification, its employer identification number (EIN), the Census Bureau reporting symbol, and, the quarter for which the payment was made; or a copy of a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter covering the refund requested. Customs also will consider other documentation offered as proof of payment of the fee, such as cancelled checks and/or affidavits from exporters attesting to the fact that all quarterly harbor maintenance tax payments made by the exporter were made exclusively for exports, and will accept that other documentation as establishing entitlement for a refund only if it clearly proves the payments were made for export harbor maintenance fees in the amounts sought to be refunded and were made by the party requesting the refund or the party on whose behalf the refund was requested.

Draft Notice of Proposed Rulemaking

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE
19 CFR PARTS 24 AND 113
RIN 1515-AB76

INTEREST ON UNDERPAYMENTS AND OVERPAYMENTS OF CUSTOMS DUTIES, TAXES, FEES, INTEREST AND OTHER CHARGES

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of Proposed Rulemaking

SUMMARY: This document proposes to amend the Customs Regulations to reflect the provisions of section 505 of the Tariff act of 1930 (19 U.S.C. 1505), as amended by section 642(a) of the North American Free Trade Agreement Implementation Act, regarding the assessment of interest due to underpayments or overpayments to Customs of duties and fees pertaining to imported merchandise, including interest thereon. The document also proposes to amend the Customs Regulations regarding the payment of interest due to underpayments or overpayments of fees and other charges, including interest thereon, that are not expressly covered by the terms of 19 U.S.C. 1505 but to which the same principles apply. As reflected in the proposed amendments, interest accrues initially from the date the duties, fees or other charges are deposited, or are required to be deposited, with Customs. In addition, the document proposes to amend various regulatory provisions regarding Customs bond obligations to reflect liability for payment of fees and interest.

* * *

Customs believes that there is a proper legal basis for applying the section 505 interest principles to all statutorily required fees such as those listed above even where the final amount of the required fee payment is not finally determined in connection with a liquidation or reliquidation. In this regard, Customs notes that 19 U.S.C. 58c(g)(2) provides that "[e]xcept to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations . . . shall apply with respect to any fee prescribed under subsection (a) of this section, and with respect to persons liable therefor, as if such fee is a customs duty." Further, 26 U.S.C. 4462(f)(1) similarly provides that "[e]xcept to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty." Therefore, consistent with the statutory principle of treating the fees and taxes imposed under 19 U.S.C. 58c and 26 U.S.C. 4461 as if they were customs duties, Customs is required to apply the rules and principles of section 505 to those fees and taxes. Customs believes that section 505 is one of the customs laws which by Congressional mandate applies to the fees and taxes Customs collects pursuant to 19 U.S.C. 58c and 26 U.S.C. 4461.

Accordingly, Customs believes that it is appropriate, under applicable statutory authority, to amend the regulations to reflect the applicability of the section 505 interest provisions to all fees (including the railroad car and passenger arrival fees under 19 U.S.C. 58(c) and the port use (harbor maintenance) fee applicable to commercial passengers and to imported merchandise admitted into a foreign trade zone and to the export or coastwise movement of merchandize under 26 U.S.C. 4461). Thus, the regulations would reflect that interest is assessable on underpayments of all fees from the date the fee was required to be deposited with Customs and that interest accrues on over-

payments of all fees from the date the fee was deposited with Customs.

* * *

It is proposed to amend 24.36 by revising the first sentence of paragraph (a), by adding a new sentence at the end of paragraph (a), by revising the first sentence of paragraph (b), and by revising paragraph (c). These proposed changes would: add references to the refund of excessive "fees" and "interest" as provided for in section 505(b); reflect the 30-day deadline for timely refunds provided for in section 505(b) and the 30-day interest period provisions for delinquent refunds under section 505(d); and extend the refund provisions to cover duties, taxes, fees, interest and other charges not incurred in connection with the entry liquidation process, in order to reflect the Customs modernization and treatment-as-duties principles discussed above and also cover cases in which an administrative refund is made by Customs prior to liquidation of an entry. The majority of these substantive changes are contained in the proposed new sentence at the end of paragraph (a) and, except where variances are necessary to reflect a refund context, those proposed changes generally follow the terminology and structure used in the proposed revision of 24.3a discussed above.

* * *

New paragraph (a)(1)(ii), which would cover the accrual of interest on refunds not resulting from a liquidation process, provides for accrual "from the date the fees . . . or other charges . . . were paid to Customs to the date on which the amount to be refunded is determined," because this time period is most analogous to the time period prescribed in section 505(c).

New paragraph (a)(2)(ii) provides that other refunds (that is, refunds not determined to be due on a liquidation or reliquidation) shall be paid within 30 calendar days of "the date on which the amount to be refunded is determined," because that point in time is most analogous to the date of liquidation or reliquidation prescribed in section 505(b).

* * *

(1) The refund shall include interest on the excess moneys deposited with Customs,

and such interest shall accrue:

(i) From the date the duties , taxes, fees (see 24.23 and 24.24(e)(3)(ii)), and interest were deposited with Customs to the date of liquidation or reliquidation of the applicable entry or reconciliation; or

(ii) In all other cases, from the date the duties, taxes, fees (see, for example, 24.22(d) and (g) and 24.24(e)(1), (2), (3)(iii) and (4)), interest or other charges (for example, charges for reimbursable services under 24.16 and 24.17 and miscellaneous charges other than liquidated damages, fines, and penalties) were paid to Customs to the date on which the amount to be refunded is determined;

(2) The refund, together with interest thereon as provided in paragraph (a)(1), shall be paid:

(i) In the case of a refund of duties, taxes, fees, or interest determined to be due on a liquidation or reliquidation, within 30 calendar days of the date of liquidation or reliquidation; or

(ii) In all other cases, within 30 calendar days of the date on which the amount to be refunded is determined.

Supreme Court, U.S.
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No. 02-1221

In the Supreme Court of the United States

UNITED STATES SHOE CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 19 U.S.C. 1505 or 28 U.S.C. 2411 authorizes an award of pre-judgment interest on a judgment for the return of fees collected by the United States under the Harbor Maintenance Tax, 26 U.S.C. 4461.

2. Whether the Export Clause or the Takings Clause of the Constitution authorizes an award of pre-judgment interest on a judgment for the return of fees collected by the United States under the Harbor Maintenance Tax, 26 U.S.C. 4461.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 296 F.3d 1378. The opinion of the Court of International Trade (Pet. App. 13a-19a) is reported at 20 C.I.T. 206.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2002. The petition for rehearing was denied on October 22, 2002. Pet. App. 114a-115a. On January 8, 2003, the Chief Justice extended the time within which to file the petition for a writ of certiorari to and including February 19, 2003, and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

Petitioner is an exporter of goods. Pursuant to this Court's decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), petitioner received a refund of payments it made to the United States under the Harbor Maintenance Tax, 26 U.S.C. 4461. Petitioner now also claims an entitlement to pre-judgment interest on the amount of that refund. That claim for interest, which was denied by the court of appeals, is the subject of this petition.

1. In 1986, Congress enacted the Harbor Maintenance Tax as part of the Water Resources Development Act, Pub. L. No. 99-662, 100 Stat. 4082. The Harbor Maintenance Tax imposes a fee "on any port use" by commercial importers, exporters, domestic shippers, and passenger liners. 26 U.S.C. 4461(a). For shipments of goods, this port use fee is set at "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). The purpose of this fee is to require the entities that benefit from the use of port facilities to share the burden of the costs borne by the United States in maintaining those facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The funds collected by the United States through this port use fee are paid into the Harbor Maintenance Trust Fund and thereafter expended on the operation and maintenance of channels and harbors throughout the United States. 26 U.S.C. 9505(a), (c).

2. In 1998, this Court held that the Harbor Maintenance Tax, as applied to shipments of exported goods, violates the prohibition contained in the Export Clause of the United States Constitution that "[n]o Tax or

Duty shall be laid on Articles exported from any State." *United States* v. *United States Shoe Corp.*, 523 U.S. 360. In reaching that conclusion, the Court did not disagree with the government's contention that an appropriate port use fee could be applied to exports under the Court's Export Clause jurisprudence. *Id.* at 367. The Court emphasized that exporters are not "exempt from any and all user fees designed to defray the cost of harbor development and maintenance." *Id.* at 370. The Court held, however, "that such a fee must fairly match the exporters' use of port services and facilities" and concluded that the Harbor Maintenance Tax does not qualify as "a bona fide user fee in the Export Clause context" because "the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here." *Id.* at 369-370. The Court held that the port use fee could not be applied to exports because the value of the exported cargo on which the Harbor Maintenance Tax is calculated (26 U.S.C. 4461(b)) "does not correlate reliably with the federal harbor services used or usable by the exporter." 523 U.S. at 369. The Court indicated, by contrast, that a harbor maintenance charge applying to exports could be sustained if it were instead based "on factors such as the size and tonnage of a vessel, the length of time it spends in ports, and the services it requires." *Ibid.*

3. Following the decision of this Court in *United States Shoe Corp.*, the Court of International Trade entered judgment for petitioner for the amount of its Harbor Maintenance Tax payments and for "interest on the money judgment awarded in this case, pursuant to 28 U.S.C. § 2411." Pet. App. 112a. The statute on which the court relied authorizes interest "at the over-payment rate established under section 6621 of the

Internal Revenue Code" on a judgment entered by any court "for any overpayment in respect of any internal-revenue tax." 28 U.S.C. 2411.

4. The United States appealed the award of interest. Relying in large part on its prior decision in *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (2000) (*IBM*), cert. denied, 531 U.S. 1183 (2001), the court of appeals reversed. Pet. App. 1a-19a.

a. The court first rejected petitioner's assertion that interest is authorized in this case under statutory provisions pertaining to refunds of internal revenue taxes (28 U.S.C. 2411) and customs exactions (28 U.S.C 2644 and 19 U.S.C. 1505). Pet. App. 5a-6a. The court noted that, in *IBM*, the court had already considered and rejected the same arguments advanced by petitioner in this case. Pet. App. 5a-6a.

As in *IBM*, the court explained that 28 U.S.C. 2411 does not authorize an award of interest in this case because that statute provides for interest only on an "overpayment in respect of any internal-revenue tax" (28 U.S.C. 2411). This statute does not apply to the Harbor Maintenance Tax because Congress specified that "all *administrative and enforcement provisions of customs laws* and regulations shall apply [to the Harbor Maintenance Tax] as if such tax were a customs duty" (26 U.S.C. 4462(f)(1) (emphasis added)). Interest cannot be awarded under the enforcement provisions applicable to internal revenue taxes because Congress specified that the Harbor Maintenance Tax is to be treated as a customs charge, rather than an internal revenue tax, for all enforcement purposes. Pet. App. 5a (citing *IBM*, 201 F.3d at 1373).

The court of appeals also rejected petitioner's assertion that Congress authorized an award of interest in this case under 28 U.S.C. 2644. Pet. App. 5a. That

statute "provides for post-summons interest for claims that invoke the Court of International Trade's jurisdiction under 28 U.S.C. § 1581(a)." Pet. App. 5a. As this Court concluded in *United States Shoe Corp.*, 523 U.S. at 365, jurisdiction in this case is based on Section 1581(i), not on Section 1581(a). Under the clear text of 28 U.S.C. 2644, interest is therefore not available under that statute in this case. Pet. App. 5a.

The court similarly rejected petitioner's assertion that an award of interest in this case is authorized by 19 U.S.C. 1505(c). That customs provision specifies that "[i]nterest on excess moneys deposited shall accrue * * * *from the date the importer* * * * *deposits estimated duties*, fees, and interest * * * *to the date of liquidation* or reliquidation *of the applicable entry* * * * ." 19 U.S.C. 1505(c) (emphasis added). The court held that this statute has no application to the claim for interest in this case because it authorizes interest only in cases that involve an improper assessment of customs duties and fees on imported articles upon their entry into the customs territory of the United States. Pet. App. 6a. Because this statute "speaks only to imports" and "does not apply to exports," the court "declined to rewrite the 'Congressional enactment to make it fit a case for which it was clearly not intended.'" *Ibid.* (quoting *IBM*, 201 F.3d at 1374).

b. The court of appeals also rejected petitioner's assertion that the Constitution requires the payment of interest in this case. Petitioner argued that the Harbor Maintenance Tax constitutes a taking of property without compensation and that interest is therefore required by the Fifth Amendment of the Constitution. The court of appeals explained that a fee charged for the use of government-maintained port facilities does not constitute a taking for which "just compensation" is

required by the Fifth Amendment. Pet. App. 7a (citing *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989)). The court emphasized that the Harbor Maintenance Tax "did not rise to the level of a taking" because it did not impose an "excessive" charge for the use of government facilities. Pet. App. 8a. The harbor maintenance fee had been stricken only for shipments of exported goods under the Export Clause; it had not been stricken for *any* goods under the Takings Clause. Moreover, it was stricken for shipments of exported goods only because the fee was "proportional to the value of the exported goods" rather than to "the actual use of the harbors." *Id.* at 7a (citing *United States Shoe Corp.*, 523 U.S. at 369). The fact that this fee had been calculated by the use of factors that were invalid *for exporters only* did not support a claim that an unconstitutional "taking" of property had occurred. *Id.* at 8a.[1]

The court also rejected petitioner's claim that interest is authorized in this case by the Export Clause itself. The court concluded that, while the Export Clause requires the return of duties and other exactions improperly imposed on exported goods, nothing in the text of that Clause "mandates the payment of interest." Pet. App. 9a. The court emphasized that, unlike the Takings Clause, the Export Clause "lacks * * * remedial language" that would authorize an award of interest. *Id.* at 11a.

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[1] The court also rejected petitioner's claim that the Harbor Maintenance Tax violates the Due Process Clause. The court explained that a governmental charge for the use of port facilities is not arbitrary or capricious, for it serves the rational purpose of requiring entities who use and benefit from port facilities to fund their maintenance. Pet. App. 9a.

c. Finally, the court rejected petitioner's broad assertion that, even without any specific consent to an award of interest in a statute or constitutional provision, courts should award interest in this case under principles of restitution and unjust enrichment. The court noted that this request for judicial legislation could not be reconciled with the firmly established principle that awards of interest against the United States must be based on the express, "affirmative and unequivocal" consent of the United States. Pet. App. 11a (citing *Library of Congress* v. *Shaw*, 478 U.S. 310, 311 (1986)).

ARGUMENT

The court of appeals correctly held that the statutes and constitutional provisions on which petitioner relies do not authorize an award of interest against the United States in the context of this case. The decision of the court of appeals properly applied well-established principles governing waivers of sovereign immunity to the particular facts of this case. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. This Court has made clear that "interest cannot be recovered [from the United States] unless the award of interest was affirmatively and separately contemplated by Congress." *Library of Congress* v. *Shaw*, 478 U.S. 310, 315 (1986). "In the absence of an express congressional consent to the award of interest * * *, the United States is immune from an interest award." *Id.* at 314. The court of appeals correctly determined that none of the statutes cited by petitioner satisfies the requirement of *Shaw* that there be an "express congressional consent to the award of interest" (*ibid.*) for

the harbor maintenance fees at issue in this case. Pet. App. 4a-6a.[2]

a. Petitioner errs in relying on 28 U.S.C. 2411, which authorizes interest only on a judgment for the "overpayment * * * of any internal-revenue tax." As the court of appeals correctly held, the plain text of this statute does not authorize interest for payments of harbor maintenance fees. Pet. App. 5a (citing *IBM*, 201 F.3d at 1371-1374). Recognizing that a fee imposed for the use of specific government facilities differs from the ordinary concept of an "internal-revenue tax," Congress specified in 26 U.S.C. 4462(f)(3) that the Harbor Maintenance Tax "shall *not* be treated as a tax" under "any * * * provision of law relating to the administration and enforcement of internal revenue taxes." *Ibid.* (emphasis added). Because Congress expressly elected to make the Harbor Maintenance Tax subject to the enforcement provisions of the customs laws instead of the enforcement provisions of the tax laws (26 U.S.C. 4462(f)(1)), the authority to award interest in a case involving a refund of an "internal-revenue tax" (28 U.S.C. 2411) is expressly and intentionally inapplicable to this case. Pet. App. 5a; *IBM*, 201 F.3d at 1371-1372.

Petitioner errs in claiming (Pet. 19) that the requirement in this statute that the Harbor Maintenance Tax "not be treated" as an internal revenue tax for purposes of "administration and enforcement" (26 U.S.C. 4462(f)(3)) does not preclude treatment of this port use fee as

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[2] This Court declined to review the same statutory contentions when they were raised by an identically-situated exporter two years ago in the *IBM* case. See 531 U.S. 1183 (2001). The petitioner in *IBM* had not even sought to raise the constitutional theories for an award of interest that were raised, and rejected by the court of appeals (Pet. App. 6a-11a), in this case.

an "internal-revenue tax" for purposes of a judicial award of interest. The court of appeals correctly noted that the portion of the Internal Revenue Code that concerns "Procedure and Administration" of internal revenue taxes includes the provisions that govern "Judicial proceedings"—such as civil actions by the United States (subchapter A), civil actions by taxpayers and third parties (subchapter B), and Tax Court proceedings (subchapter C). *IBM*, 201 F.3d at 1372-1373. The court correctly held (Pet. App. 5a) that, by making the *entire* judicial and administrative enforcement mechanism that applies to internal revenue taxes inapplicable to the Harbor Maintenance Tax, Congress necessarily precluded application of the statute that authorizes interest only in cases involving an "overpayment" of an "internal-revenue tax." 28 U.S.C. 2411. A statute that authorizes interest for overpayments of an "internal-revenue tax" plainly does not constitute "express congressional consent to an award of interest" (*Library of Congress* v. *Shaw*, 478 U.S. at 314) for an exaction that Congress specified is "not [to] be treated as a tax" (26 U.S.C. 4462(f)(3)).

b. Petitioner similarly errs in claiming that 19 U.S.C. 1505(c) authorizes an award of interest in this case. As the court of appeals explained in *IBM*, "[o]n its face, [Section 1505] contemplates an entirely different factual scenerio from the one before us." 201 F.3d at 1374. Under its plain text, this statute authorizes interest only in cases in which an "importer of record" is seeking to recover a duty or other customs charge paid in connection with the "liquidation or reliquidation" of an "entry" of goods into the United States. 19 U.S.C. 1505(c). The harbor maintenance fee does not fall within any portion of the text of this statute, for it does not impose a customs duty on an "importer of record" for

the "entry" of goods into this country. Pet. App. 5a-6a.[3] Under its plain text, the statute on which petitioner relies thus simply has no application to this case. *Ibid.* And, as the court of appeals emphasized, courts are "without power to rewrite" this statute "to make it fit a case for which it was clearly not intended * * * ." *Id.* at 6a (quoting *IBM*, 201 F.3d at 1374).

Petitioner nonetheless argues (Pet. 14) that the fact that courts have authority to order refunds of harbor maintenance fees necessarily implies that courts also may award interest on such refunds. In *Library of Congress* v. *Shaw*, 478 U.S. at 314, however, this Court rejected an identical contention. The Court held in *Shaw* that, "[i]n the absence of express congressional consent to the award of interest *separate from a general waiver of immunity to suit*, the United States is immune from an interest award." *Ibid.* (emphasis added). The fact that "the Government [is] liable" for the principal amount does not "waive the Government's

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[3] Customs duties are imposed in connection with the formal entry of an article into the customs territory of the United States. *BMW Manufacturing Corp.* v. *United States*, 241 F.3d 1357, 1362 (Fed. Cir.), cert. denied, 534 U.S. 1065 (2001). Such duties are imposed on importers—not on exporters—under the Harmonized Tariff Schedule of Title 19 of the United States Code. See, *e.g.*, 19 U.S.C. 197, 1484, 1503. By contrast, the Harbor Maintenance Tax is imposed equally on the use of port facilities by domestic shippers, importers and exporters. 26 U.S.C. 4461(c)(1). This user fee does not constitute *either* an internal revenue tax or a duty, as those terms are ordinarily employed. It is instead simply a "generalized Federal charge for the use of certain harbors." *Texport Oil Co.* v. *United States*, 185 F.3d 1291, 1297 (Fed. Cir. 1999); see 66 Fed. Reg. 34,818 (2001) (citing 31 U.S.C. 9107). A fee for the use of government facilities is not a "tax" or a "duty" but is instead "compensation" for services provided. *United States Shoe Corp.*, 523 U.S. at 369.

traditional immunity from interest." *Id.* at 323. The court of appeals therefore correctly rejected petitioner's contrary assertion in this case. Pet. App. 5a-6a.[4]

2. a. Petitioner errs in claiming that the Export Clause authorizes an award of interest in this case. The court of appeals correctly held that, "[i]f not granted by statute, the Supreme Court has held only the Fifth Amendment of the Constitution to mandate the payment of interest." Pet. App. 6a.

In *Smyth* v. *United States*, 302 U.S. 329 (1937), this Court confirmed the longstanding rule that prohibits awards of interest against the United States except under the Takings Clause of the Fifth Amendment or pursuant to an express waiver of sovereign immunity by Congress. The Court noted that (*id.* at 353 (emphasis added)):

> The rule is established that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government even though there has been default in the payment of the principal * * * . *The allowance of interest in eminent domain cases is only an*

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[4] Petitioner also advances the novel contention that a "draft notice of proposed rulemaking" issued by the Customs Service supports an award of interest in this case. Pet. 17. It is, of course, well established that "mere proposals" of draft regulations are binding on no one and have "little consequence." *Boeing Co.* v. *United States*, No. 01-1209, slip op. 15 n.13 (Mar. 4, 2003). Moreover, the regulations ultimately adopted by the agency address only duties and fees owed upon the liquidation of an entry of goods by an importer. See 64 Fed. Reg. 56,436 (1999). The final regulations (which petitioner ignores) therefore have no application to the exporter's claim in this case.

apparent exception, which has its origin in the Constitution.

In *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951), the Court again emphasized that "the only exception [to the no-interest rule] arises when the taking entitles the claimant to just compensation under the Fifth Amendment. *Only in such cases does the award of compensation include interest.*" *Id.* at 49 (emphasis added). Accord, *e.g.*, *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 47 (1928). The Court has held that the unique, remedial language of the "just compensation" requirement of the Fifth Amendment represents a sufficient waiver of the no-interest rule. *Library of Congress* v. *Shaw*, 478 U.S. at 317 n.5 ("To satisfy the constitutional mandate, 'just compensation' includes a payment for interest."); *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 306 (1923). See also *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 315 (1987) (the Fifth Amendment is not designed "to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"). As the court of appeals correctly held in this case, the prohibitory language of the Export Clause does not support an award of interest because it contains no similar, express remedial directive and, in particular, includes no broad undertaking to pay "just compensation" for violations. Pet. App. 6a-7a.[5]

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[5] Petitioner errs in suggesting (Pet. 21) that the decision of this Court in *Fairbank* v. *United States*, 181 U.S. 283 (1901), provides support for the proposition that an award of interest is authorized by the Export Clause. Nothing in *Fairbank* endorses that claim. The portion of the *Fairbank* decision quoted in the petition (Pet.

This holding of the court of appeals properly applies the decisions of this Court and does not conflict with any decision of any other court. Moreover, contrary to petitioners' assertion (Pet. 23), the decision in this case also does not conflict with the earlier decision of the same court in *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001). In *Cyprus Amax*, the court concluded that an award of monetary relief is permitted under the Tucker Act for a violation of the Export Clause because that Clause "contemplates money damages as a remedy for its violation." 205 F.3d at 1376. The separate question whether the Export Clause provides authority for an award of *interest* was not raised or addressed in *Cyprus Amax*. And, in *Library of Congress* v. *Shaw*, this Court made clear that, even when sovereign immunity from monetary relief has been waived, there is a "requirement of a separate waiver" before interest may be awarded. 478 U.S. at 314. The Court explained in *Shaw* that this "separate waiver" requirement "reflects the historical view that interest is an element of damages separate from damages on the substantive claim." *Ibid.* Petitioner simply overlooks this central holding of the *Shaw* decision. Applying that settled rule in this case, the court of appeals correctly held that no such "separate waiver" for an award of interest exists under the Export Clause. Pet. App. 6a-7a. See *United States* v. *Alcea Band of Tillamooks*, 341 U.S. at 49.

21-22) contains nothing more than a general discussion of the fact that the Export Clause was consciously designed to prohibit taxes and duties on exports. 181 U.S. at 292-293. That general discussion of the Export Clause in *Fairbank* supports the conclusion of the court of appeals in this case that the Export Clause is a "prohibitive" provision (Pet. App. 11a), and nothing in *Fairbank* addresses the "remedial" (*ibid.*) issue addressed in this case.

b. Petitioner has no right to interest under the Takings Clause of the Constitution because no "taking" occurred. The court of appeals correctly explained that the requirement that exporters, importers and domestic shippers pay a fee for each use of port facilities does not constitute a taking of private property. Pet. App. 7a. As this Court held in *United States* v. *Sperry Corp.*, 493 U.S. 52, 63 (1989), a "reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services."[6] Applying that holding in this case, the court of appeals properly concluded that the harbor maintenance fee imposed by Congress on all shippers who use harbor facilities was not "excessive" and therefore did not effect a "taking" under this Court's decision in *Sperry*. Pet. App. 8a. Even though the court of appeals prominently relied on *Sperry* (Pet. App. 8a), petitioner fails to cite or even note the existence of that decision in the petition.[7]

c. Finally, petitioner cannot avoid the no-interest rule by characterizing its claim as one designed to

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[6] The court of appeals correctly noted that the port use fees that are collected to reimburse the government for the costs of maintaining port facilities are "not held by the government as property of U.S. Shoe." Pet. App. 8a. The harbor maintenance fees are held in a trust fund that is applied only for harbor maintenance purposes. 26 U.S.C. 9505.

[7] Petitioner also does not address the fact that the harbor maintenance fee applies to *importers and domestic shippers* as well as to exporters. While the Export Clause protects exporters from a fee that "does not correlate reliably with the federal harbor services, facilities, and benefits used or usable by the exporter" (*United States Shoe Corp.*, 523 U.S. at 369), that does not alter the analysis applied under the Takings Clause in determining whether a user fee is "excessive." It would not be "excessive" for exporters unless it were also "excessive" and (thus a violation of the Takings Clause) for importers and domestic shippers as well.

achieve "equity" or to recover "profits that [the government] actually earned on unlawful exactions" (Pet. 23). "[T]he force of the no-interest rule cannot be avoided simply by devising a new name for an old institution: '[T]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it.'" *Library of Congress* v. *Shaw*, 478 U.S. at 321 (quoting *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976)). Petitioner's claim for the asserted "profits" earned by the government is nothing more than a thinly disguised attempt to recover interest by invoking a fiction that this Court has routinely rejected.

For example, more than a century ago, in *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251 (1888), this Court held that a plaintiff's claim for the income derived by the United States from the investment of funds belonging to the plaintiff was barred by the no-interest rule. In that case, the government had collected a sum of money from Spain in arbitration proceedings conducted on behalf of a plaintiff for injuries and damages suffered by her while she was in Cuba. The United States paid this recovery to the plaintiff, but withheld $41,129 until Spain paid the expenses of the arbitration. After receiving that additional payment from Spain, the United States paid the withheld amount to the plaintiff without the interest that had been earned through investment of those funds. *Id.* at 252-255. This Court held that, in the absence of an express waiver of immunity, the plaintiff's claim for the interest earned on the withheld funds was barred by the "no-interest" rule (*id.* at 259-260 (emphasis added)):

> Th[e] claim, in the present controversy, assumes the shape of a claim for the increment or income alleged to have been actually received by the United States from the investment of the money for the time that it was withheld; *but the claim in that respect is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally,* or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the money. *The case, therefore, falls within the well-settled principle that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect.*

This Court applied that same principle in *United States* v. *Louisiana*, 446 U.S. 253, 264 (1980). The Court held in that case that, in the absence of an express waiver, the no-interest rule barred the recovery of interest on funds impounded by the United States pending resolution of a territorial dispute between the United States and the State of Louisiana. The Court held that this result was not altered by the fact that the funds had been "commingled with general funds of the Treasury and used in governmental operations." *Ibid.*

Petitioner errs in relying on *Henkels* v. *Sutherland*, 271 U.S. 298 (1926), to support a claim that an express waiver of governmental immunity is not required to recover profits earned on "unlawful exactions" (Pet. 23). The *Henkels* decision is clearly inapposite, for the Court concluded that the statute involved in that case provided for the recovery of interest along with principal. In *Henkels*, the petitioner owned shares of stock

that were seized by the Alien Property Custodian as "enemy-owned property" under the Trading with the Enemy Act of October 6, 1917. *Id.* at 299. That stock was sold by the Custodian, and the proceeds were deposited with the Treasury where they were commingled with the proceeds from the sale of other alien property and invested in interest-bearing government securities. *Ibid.* The same statute that authorized these seizures also authorized a suit in equity to recover, for any mistakenly seized property, the "net proceeds received * * * and held by the Alien Property Custodian or by the Treasurer of the United States." *Id.* at 300 (quoting Trading with the Enemy Act of October 6, 1917). Under this statute, Henkels sought to recover the proceeds of the sale along with the interest earned on the government securities. *Id.* at 299-300. This Court held that this claim was encompassed within the statutory right to recover the "net proceeds" held in "the account of the Alien Property Custodian." *Id.* at 300-301. The Court made clear that this statutory right to obtain the "net proceeds" held in the account of the Custodian "is not [a claim] for interest to be paid by the United States in the sense of the [no-interest] rule." *Id.* at 301. The Court's decision in *Henkels* thus neither expressly nor by implication contradicts the established rule that "[t]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." *Library of Congress* v. *Shaw*, 478 U.S. at 321 (citation omitted).[8]

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[8] Petitioner's suggestion that *Henkels* supports an award of interest whenever an "unlawful exaction" occurs (Pet. 23) simply cannot be reconciled with the text of that decision. The Court

Finally, petitioner errs in relying (Pet. 23-24) on the decisions of the Sixth and Ninth Circuits that have held that, in the absence of a statutory waiver, interest may be awarded against the government in currency forfeiture cases. See, *e.g.*, *United States* v. *$515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998); *United States* v. *$133,735.30 Seized*, 139 F.3d 729 (9th Cir. 1998); *United States* v. *$277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995). Those decisions have been severely criticized,[9] for they cannot be reconciled with the decisions of this Court. Indeed, in *United States* v. *$133,735.30*, *supra*, the Ninth Circuit cited *no* decisions of this Court. And, in *United States* v. *$277,000 U.S. Currency*, 69 F.3d at 1492, the only decision cited was *Library of Congress* v. *Shaw*, which the Ninth Circuit purported to distinguish as a case that involved a prohibited award of "interest" instead of one that involved a claim for the financial "benefit" that the government received "from an asset that it has been holding improperly." 69 F.3d at 1498.[10] In attempting to

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emphasized in *Henkels* that whether or not the exaction was unlawful had no bearing on its resolution of the statutory issue before it. 271 U.S. at 300 ("No question is made in respect of the right of the Custodian to seize property supposed to belong to an enemy, although it may subsequently turn out to have been a mistake, adequate provision having been made for a return in that case.").

[9] Several other circuits have disagreed with the suggestion that the "no-interest" rule is inapplicable to such cases. See *Larson* v. *United States*, 274 F.3d 643, 645-647 (1st Cir. 2001); *United States* v. *$30,006.25 in U.S. Currency*, 236 F.3d 610, 613 (10th Cir. 2000); *United States* v. *$7,990.00 in U.S. Currency*, 170 F.3d 843, 845 (8th Cir.), cert. dismissed, 528 U.S. 1041 (1999); *Ikelionwu* v. *United States*, 150 F.3d 233, 238-239 (2d Cir. 1998).

[10] The financial "benefit" that the Ninth Circuit sought to distinguish from "interest" in that case was inconsistently described

distinguish the *Shaw* case in that manner, the Ninth Circuit failed to respect (and even failed to acknowledge) the unequivocal direction of this Court "that 'the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution.'" *Larson* v. *United States*, 274 F.3d at 647 (quoting *Library of Congress* v. *Shaw*, 478 U.S. at 321); see note 10, *supra*. The Ninth Circuit also improperly sought to rely on "fairness considerations" and thereby ignored the clear admonition of this Court that "[c]ourts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *Larson* v. *United States*, 274 F.3d at 647 (quoting *Library of Congress* v. *Shaw*, 478 U.S. at 321).

The question addressed in these currency forfeiture cases, however, has no continuing importance. See *Larson* v. *United States*, 274 F.3d at 647. As petitioner acknowledges (Pet. 24), Congress has amended the forfeiture statute to allow the recovery of interest prospectively. 28 U.S.C. 2465(b)(1)(C). Any disagreement among the circuits in the currency forfeiture context thus plainly lacks prospective importance. It also does not justify review of the questions presented in the markedly different context of this harbor maintenance fee case. Because the decision in this case properly implements the longstanding decisions of this Court, and does not conflict with decisions of any other circuit, further review is not warranted.

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elsewhere in its opinion as the "earned interest on money" held by the government. 69 F.3d at 1492.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-1221

IN THE

Supreme Court of the United States

UNITED STATES SHOE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF PEARSON EDUCATION, DANIEL F. YOUNG, INC., SCHENKER, INC. AND OTHER NAMED PARTIES AS *AMICI CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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OCI. International, Inc.
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Schott Glass Technologies, Inc.
Silbond Corp.
Sims Portex, Inc.
State Oil Company, Suriname
Trak International, Inc.
(parent: Omni Quip International, Inc.)
Universal Business Corporation
Unsworth Transport International, Inc.
The Vendo Company
W.A. Baum, Inc.
Wagstaff, Inc.

QUESTION PRESENTED

Whether petitioner was denied substantive due process of law guaranteed by the Fifth Amendment of the United States Constitution when the respondent federal government arbitrarily, unreasonably, and unfairly retained interest owed to petitioner on Harbor Maintenance Taxes collected in violation of the Constitution.

TABLE OF AUTHORITIES

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STATEMENT OF INTEREST[1]

Rodriguez O'Donnell Ross Fuerst Gonzalez & Williams represents 35 exporters and freight forwarders that are agents for hundreds more exporters seeking refunds of Harbor Maintenance Taxes collected in violation of the Constitution during the period January 1987 through March 1998 together with interest on the amount of these taxes.

These exporters and forwarders share a common interest with petitioner, United States Shoe Corporation. All of these parties gained their rights to refunds of Harbor Maintenance Taxes during the original U.S. Shoe Corporation case in which this Court declared the tax law unconstitutional on March 31, 1998. Now all will benefit justifiably should the Court order the respondent government to pay interest for depriving them of their Harbor Maintenance Tax (HMT) funds.

These *amici* include some large producers, freight forwarders and shippers, but generally they are small and medium-sized companies from every region around the United States and located in many of the nation's port cities on the east, west, and Gulf coasts and in the Midwest.

Fair and just treatment of these and thousands of other U.S. exporters will enhance the economy of this country. Arbitrary and unfair withholding of justly earned interest from their funds, withheld and used by the government for as long as 16 years from 1987, represents a denial of their property rights under the Due Process Clause of the Constitution's Fifth Amendment.

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[1] Pursuant to Rule 37.2(a), letters of consent from both parties have been filed with the Clerk. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici*, their members, or counsel made a monetary contribution to preparing or submitting this brief.

SUMMARY OF ARGUMENT

Petitioner U.S. Shoe Corporation has received a judgment by this Court for a refund of Harbor Maintenance Taxes, but the United States has denied petitioner full compensation by refusing to pay petitioner the proceeds it earned on the money while holding that money unlawfully. Respondent's retention of the interest on petitioner's tax funds amounts to a violation of the Due Process Clause of the U.S. Constitution. The concept of a government prohibited from depriving citizens of life, liberty and property without due process of law has its roots in the *Magna Carta*, which prohibited the monarch in England from interfering with the rights of the people by any actions that did not comply with the "Law of the Land." Cases decided under the United States Constitution have firmly established that this clause is a prohibition against the arbitrary, capricious, unreasonable or unfair exercise of power in violation of the individual rights of the people. In the present case before this Court, petitioner has been a victim of such arbitrary, unreasonable and unfair conduct on the part of the government of the United States. The government's retention of the interest is fundamentally unfair in that the government is profiting from an unconstitutional act while depriving exporters of their property rights.

The government's actions also violate equal protection of the law under the Fifth Amendment because exporters subjected to the Harbor Maintenance Tax have been treated differently from every other taxpayer—all of whom receive interest on refunds of overpayments.

ARGUMENT

I. The federal government's retention of interest on Harbor Maintenance Taxes owed to Petitioner represents a denial of substantive due process under the Constitution.

Persons in the United States are entitled to due process of law that is both procedural and substantive, and these rights apply to petitioner and approximately 7,500 exporters claiming refunds of the Harbor Maintenance Tax together with interest. As stated in the Fifth Amendment to the Constitution of the United States:

> "...nor be deprived of life liberty or property without due process of law."

It is well established that this clause recognizes substantive as well as procedural rights. *Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997); *Henkels v. Sutherland*, 271 U.S. 298, 301 (1926); *Albright v. Oliver*, 510 U.S. 266, 272 (1994); *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972).

This Court and other federal courts have ruled that substantive due process includes the right of persons to be free from arbitrary, capricious and unreasonable actions by the government with respect to private property. "For example, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), the Court held that due process requires an inquiry into whether a legislature acted in an arbitrary and irrational way when passing a retroactive law imposing liability on coal mine owners for death or disability of miners due to black lung disease." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring).

Although the Harbor Maintenance Tax was not a retroactive law, it was arbitrary in that it flagrantly ignored

the constitutional prohibition against taxing exports. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998).

In *Henkels v. Sutherland*, 271 U.S. 298, 301 (1926), this Court held that it was a violation law to seize Henkels's property illegally as alien property under the Trading with the Enemy Act and deny him payment of interest or proceeds from the sale of his stock when the government had used the property's value and reinvested it to the benefit of the government. The Court ruled that although the government ordinarily need not compensate a citizen for the lost time-value of money taken wrongfully,

> it cannot confiscate the actual increment of property belonging to a citizen or the increment of the proceeds into which such property has been converted any more than it can confiscate the property or its proceeds without coming into conflict with the Constitution.

Id. at 301.

This case is directly applicable to *U.S. Shoe Corp.*, *supra*, which involves the unconstitutional appropriation of privately owned Harbor Maintenance Tax monies invested by the government for gain. In each case, the government arbitrarily refused to pay the proceeds it earned from money that it never had a legitimate claim to possess.

This Court has also recognized a due process right to a refund of unlawfully exacted taxes. *McKesson v. Div., of Alcoholic Beverages*, 496 U.S. 18 (1990). "[I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide

meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31.

The withholding of interest arising from an unconstitutional tax is an arbitrary and unreasonable exercise of government power. This Court ruled in *U.S. Shoe I* that the government never had any right to the monies it exacted by taxing exports via the HMT. It follows that the government has no right to the interest created by those unlawfully held funds. The idea that whoever rightfully owns the principal is entitled also to the interest it generates is "deeply rooted in this Nation's history and tradition" (*Glucksberg*, 521 U.S. at 721). "The rule that 'interest follows principal' has been established under English common law since at least the mid-1700's. '*Interest shall follow the principal, as the shadow the body.*' Not surprisingly, this rule has become firmly embedded in the common law of the various States." *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 165 (1998) (emphasis added) (internal citation omitted).

At bottom, the government has violated the substantive component of the Due Process Clause because it can make no reasonable argument as to why it would possibly be entitled to keep the money it earned by unconstitutionally exacting and holding $1.435 billion. If it lacked any legitimate claim to the money, then it can have no legitimate claim to the actual proceeds earned on that money. See *Henkels*, 271 U.S. 298.

II. The government's failure to pay interest on Harbor Maintenance Taxes violates equal protection of the law

Petitioner and the *amici* represented in this brief assert the primary positions that U.S. Shoe Corporation is entitled to interest pursuant to statutes, 19 U.S.C. § 1505 and 28 U.S.C. §2411, and pursuant to substantive due process under the Fifth Amendment. They preserve all other arguments advanced in support of the Petition for Writ of Certiorari.

Alternatively, as long as the respondent government pays interest on overpayments of taxes and customs duties, but not to exporters whose money was taken via the Harbor Maintenance Tax in violation of the Constitution, then unfairness and inequality prevail. This unfairness represents a deprivation of property without due process of law and is also a denial of equal protection protected by the Fifth Amendment. In short, it is essential to reimburse interest to U.S. Shoe Corporation and all other exporter claimants in order to establish fairness and equal protection pursuant to the Fifth Amendment.

CONCLUSION

The Petition for Writ of Certiorari filed by United States Shoe Corporation should be granted.

Respectfully submitted.

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Supreme Court, U.S.
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In The Supreme Court of the United States

UNITED STATES SHOE CORPORATION, PETITIONER,

V.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

Amicus curiae Federal Circuit Bar Association ("FCBA")[1] is a national organization comprising approximately 2,400 attorneys whose practice concerns the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in all aspects of its jurisdiction. The FCBA offers a forum for common concerns and dialogue between the bar and the judges of the Federal Circuit. One of the purposes of the FCBA is to offer assistance and advice to the federal courts, including filing *amicus curiae* briefs on matters affecting practice before the Federal Circuit and lower tribunals. This brief reflects the judgment of FCBA members reached in the exercise of their profession and is offered solely to assist this Court in determining whether to grant *certiorari* in this matter.

SUMMARY OF ARGUMENT

As a result of the Federal Circuit's decision in *United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002) ("*U.S. Shoe II*"), there is currently a three-way split among the circuits as to how interest should be calculated on refunds of

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner United States Shoe Corporation ("U.S. Shoe") has filed a global consent to the submission of *amicus* briefs in support of either party, which is on file with the Clerk. Respondent's letter consenting to the filing of this brief accompanies this filing.

unconstitutionally exacted monies. In *Henkels v. Sutherland*, 271 U.S. 298 (1926), this Court held that proceeds actually earned by the Government on money it exacted unlawfully are not interest for purposes of governmental immunity. The Ninth Circuit held that parties who are entitled to a refund from the Government should receive the lost time-value of the money. The United States Court of Federal Claims, however, reasoned that the actual proceeds the Government earned on the money should be refunded. In *U.S. Shoe II*, the Federal Circuit flatly contradicted *Henkels* and ruled that the Government does not owe parties anything outside of the principal.

There is also a conflict among the circuits as to whether the no interest rule applies where the Government has earned interest on unlawfully (or, in this case, unconstitutionally) exacted monies. The Sixth and Ninth Circuits have held that, when the United States seizes money unlawfully, the Government must repay that money with interest. In contrast, the First, Second, Eighth and Tenth Circuits have held that the no interest rule of *Library of Congress v. Shaw*, 478 U.S. 310 (1986), prevents plaintiffs from receiving interest on refunded money. Although Congress seems to have resolved the split in the forfeiture context, the split among the circuits continues in non-forfeiture contexts like *U.S. Shoe II*.

Finally, the decision by the Federal Circuit narrowly read this Court's opinion in *Shaw* to waive sovereign immunity for payments of interest by the

Government only for unconstitutional acts involving the Takings Clause of the U.S. Constitution. This Court, however, has never stated that the only constitutional provision that waives sovereign immunity for payments of interest by the Government is the Takings Clause. To the contrary, *dicta* in decisions of this Court indicate that the opposite is true, that is, constitutional provisions other than the Takings Clause waive the Government's sovereign immunity.

For the foregoing reasons, a*micus curiae* respectfully requests this Court to grant the petition for writ of *certiorari* to clarify the existing state of the law and resolve the existing conflicts in the interpretations of the law.

ARGUMENT

I. THE PETITION FOR WRIT OF *CERTIORARI* SHOULD BE GRANTED BECAUSE, AS A RESULT OF THE FEDERAL CIRCUIT'S DECISION, THERE CURRENTLY EXISTS A CONFLICT AMONG THE CIRCUITS AS TO HOW INTEREST SHOULD BE CALCULATED ON REFUNDS OF UNCONSTITUTIONALLY EXACTED MONIES

Traditionally, the rule in the United States has been that the Government, as a sovereign, need not pay the lost time-value of money it illegally exacted from taxpayers, unless a statute, a contract, or the U.S. Constitution provides otherwise. *Shaw*, 478

U.S. at 314-17. This rule, however, does not affect the obligation of the Government to pay to the taxpayer any income the Government derived, actually or constructively, while it was holding the illegally exacted money.

This Court ruled that proceeds actually earned by the Government on money it exacted unlawfully are not "interest" for purposes of governmental immunity. *Henkels*, 271 U.S. at 300-02. In *Henkels*, the Government mistakenly seized shares of stock belonging to *Henkels*, sold the stock, and commingled the money it received from the sale with other funds. The Government then deposited the commingled funds in interest-bearing securities. The Government refunded the principal to Henkels, but claimed immunity from refunding the interest. This Court rejected that argument, stating: "[T]he claim here is not for interest to be paid by the United States in the sense of the rule [of immunity from interest]. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession." *Id.* at 301.

The situation presented in *U.S. Shoe II* is like the one presented in *Henkels*. In both cases, the Government took money unlawfully, commingled the taken money with other funds, invested the commingled funds in interest-bearing instruments, and ultimately claimed the right to withhold a refund of the interest by invoking governmental immunity. This Court's decision in *Shaw*, which

addressed the lost time-value of monies, did not affect this Court's holding in *Henkels*, which continues to be the primary case on when income earned on unlawfully exacted monies must be refunded by the Government.

Subsequently, the predecessor of the United States Court of Federal Claims[2] applied the analysis in *Henkels* to distinguish governmental retention of actual proceeds — which is not covered by the no interest rule — from "lost time-value" of money, which, it held, is covered by the rule. *See Bonnar v. United States*, 438 F.2d 540, 572 (Ct. Cl. 1971). In *Bonnar*, as in *Henkels*, the Government unlawfully seized shares of stock pursuant to the Trading With the Enemy Act, then sold the stock and kept the money from the sale. Unlike in *Henkels*, however, the Government did not actually earn interest on the money it gained from selling Bonnar's stock: "So far as the record in this case discloses, * * * no *Henkels* situation exists" because "the funds are in the account and are not accruing any interest, income, or economic benefit to the Alien Property Custodian." *Bonnar*, 438 F.2d at 572.

The Sixth and Ninth Circuits rejected the reasoning of *Bonnar*. *See United States v. $515,060.42,* 152 F.3d 491 (6th Cir. 1998); *United States v. $277,000,* 69 F.3d 1491 (9th Cir. 1995). In *$515,060.42* and in *$277,000*, the Government

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[2] When *Bonnar* was originally decided, the court was referred to as the Court of Claims. In 1982, the court was renamed the United States Claims Court, and, as of 1992, the official name is the United States Court of Federal Claims.

unlawfully seized money and deposited it into a Treasury account. The court of appeals lacked sufficient evidence in each case to determine whether the money had actually earned interest in the account. *$515,060.42*, 152 F.3d at 505; *$277,000*, 69 F.3d at 1494-95.

The Sixth Circuit remanded the action before it for a determination of whether interest was actually earned to decide the method of calculating damages. *$515,060.42*, 152 F.3d at 505-06. The Sixth Circuit held that, if interest had been earned by the Government, it must be disgorged; whereas, if no interest had been earned, the Government owed constructive interest calculated at the alternative borrowing rate. *Id.*

In *$277,000*, the Ninth Circuit ruled that "whatever the formal status of the funds, * * * it is clear that the translation of the cash from sterile paper into a deposit fund in fact redounds to the direct benefit of the federal government, in a manner that is completely equivalent to the earning of interest." *$277,000* 69 F.3d at 1495. The court concluded:

> Thus, we hold that to the extent the funds were deposited in the Treasury as of June 1987, those funds should be considered as constructively earning interest at the government's alternative borrowing rate at all times from then until the rendering of judgment in this case. Such amounts, in accordance with the judge's order and past

> practice, become part of the *res*, to be returned with the *res* to the claimant.

Id. at 1496.

The manner in which the predecessor of the United States Court of Federal Claims in *Bonnar* interpreted *Henkels* makes it clear that if that court were deciding *$515,060.42* or *$277,000*, it would examine whether interest was actually earned and would deny any interest if the answer were no. In its *U.S. Shoe II* decision, the Federal Circuit reached a decision that conflicts with decisions of both the Sixth and Ninth Circuits and the court in *Bonnar*. According to the reasoning of *$277,000* and *$515,060.42*, exporters like U.S. Shoe should receive the lost time-value of their collective monies — estimated at approximately $700 million by Petitioner. According to the reasoning of *Bonnar*, exporters like Petitioner U.S. Shoe should receive the actual proceeds the Government earned on its investment of their collective monies — estimated at approximately $70 million by Petitioner. But the Federal Circuit, in *U.S. Shoe II,* ruled that the Government owes the exporters nothing. That ruling flatly contradicts *Henkels* and creates a three-way split of authority on the correct approach to awarding interest on refunds of unlawfully, and, in *U.S. Shoe II,* unconstitutionally, exacted monies. This Court should grant the petition for writ of *certiorari* to resolve this conflict.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THERE CURRENTLY EXISTS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE NO INTEREST RULE APPLIES WHERE THE GOVERNMENT HAS EARNED INTEREST ON UNCONSTITUTIONALLY EXACTED MONIES.

Six federal circuit courts have addressed the applicability of the no interest rule to unlawful confiscations of money by the Government. Two of the circuits have come to the conclusion that the no interest rule is not applicable, while four circuits have reached the opposite conclusion. In 2000, the Tenth Circuit noted what, at that time, was a two-to-two circuit split:

> [T]he circuits are split on whether the government can be ordered to pay interest when it must return seized property to a claimant following an unsuccessful forfeiture action. The Eighth and Second Circuits hold that sovereign immunity bars an award of interest since the government has not waived its immunity from suit in this respect. While acknowledging there is no relevant waiver of sovereign immunity, the Ninth and Sixth Circuits view the matter not as an award of interest, but as the government's duty to disgorge property, earned while the seized *res* was in the government's hands, that was not forfeited.

United States v. $30,006.25, 236 F.3d 610, 613 (10th Cir. 2000).

The Ninth and Sixth Circuits have held, in the context of a civil forfeiture, that, when the United States seizes money unlawfully, the Government must repay the money with any interest that was, or should have been, earned on the money. *$277,000*, 69 F.3d at 1491; *$515,060.42*, 152 F.3d at 504-06. In *$277,000*, the Ninth Circuit stated that the no interest rule is inapplicable because the plaintiff is not requesting interest, but merely what the money seized has become:

> The action of the court below in stating that the interest earned on the money in an interest-bearing account would become part of, and would be substituted for (along with the original amount) the *res* itself is fully in accord with common sense. If the government seized, for example, a pregnant cow and was ultimately found not to be entitled to the cow after it had given birth, it could hardly be contended that the government had fulfilled its duty by returning the now-barren cow, but retaining the calf.

$277,000, 69 F.3d at 1496.

The Ninth Circuit also distinguished the situation where the Government has decreased the value of unlawfully seized property while it was in the Government's possession:

> By contrast, in our case there is in fact a benefit from the use of the money, which must be allocated either to the government or the claimant. There is no element here of forcing the government to pay for damage it has done, only that it must disgorge benefits that it has actually and calculably received from an asset that it has been holding improperly.

Id.

The Ninth Circuit adhered to *$277,000* in *United States v. $133,735.30*, 139 F.3d 729, 731-32 (9th Cir. 1998), ruling that, when the Government deposits unlawfully seized funds in an interest-bearing account, the Government must pay the wronged party the actual interest accrued on those funds. *Id.* The court explained that, in *$277,000*, the United States was obligated to pay interest at the Government's alternative borrowing rate only because it had not deposited the seized money in an interest-bearing account. *Id.* In addition, a district court within the jurisdiction of the Ninth Circuit followed *$277,000*, requiring the Government to pay pre-judgment interest on money unlawfully seized in a forfeiture action: "The United States as trustee of the forfeited funds may not retain the interest actually or constructively earned on the forfeited funds." *United States v. Chan*, 22 F. Supp.2d 1123, 1127 (D. Haw. 1998).

In *$515,060.42*, the Sixth Circuit addressed facts virtually identical to those in *$277,000*. Taking

guidance also from the Ninth Circuit's decision in *$133,735.30*, the Sixth Circuit explained that, on remand, the district court should calculate interest in a manner determined by whether the Government had actually earned interest on the seized money. *$515,060.42*, 152 F.3d at 505-06. If no interest had been earned, "the seized funds should be treated as constructively earning interest at the Government's alternative borrowing rate at all times until the rendering of judgment. Such amounts become part of the *res*, to be returned with the *res* to claimants." *Id.* at 505. If the Government had earned interest, "the Government satisfies its burden to disgorge the benefit that it has received from the use of a claimant's property by turning over the interest actually earned on the seized funds." *Id.* at 505-06.

In addition, a district court within the jurisdiction of the Sixth Circuit relied upon *$515,060.42* in awarding interest to a company that had overpaid $3.5 million in taxes. *E. W. Scripps Co. v. United States*, 2002 U.S. Dist. LEXIS 20283 (S.D. Ohio Sept. 16, 2002). The court ruled that the statute waiving immunity from interest in cases of tax overpayments authorizes a lawsuit for interest even if the Government has already refunded the principal. It reasoned that interest is part of the principal, citing the "pregnant cow" analogy of *$515,060.42*. *Id.* at *12-*13. This case goes beyond the forfeiture context of the Sixth and Ninth Circuit cases.

Unlike the Sixth and Ninth Circuits, the First, Second, Eighth, and Tenth Circuits have all held that the no interest rule of *Shaw* prevents plaintiffs

from collecting interest on money seized in forfeiture cases. *Larson v. United States*, 274 F.3d 643 (1st Cir. 2001); *United States* v. *$30,006.25*, 236 F.3d 610, 614-15 (10th Cir. 2000); *United States* v. *$7,990.00*, 170 F.3d 843, 845-46 (8th Cir. 1999); *Ikelionwu v. United States*, 150 F.3d 233, 238-39 (2d Cir. 1998). These courts take the view that proceeds earned on the seized money are "interest" *per se* and cannot be transformed into something else by mere re-naming. The Tenth Circuit reasoned: "We cannot agree with the Ninth and Sixth Circuits that recharacterizing an interest award as a disgorgement of profits circumvents the effect of sovereign immunity." *$30,006.25*, 236 F.3d at 613. The First Circuit used the same rationale:

> As the Supreme Court made clear in *Shaw*, "courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *Shaw*, 478 U.S. at 321. This Court went on to caution in Shaw that "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." *Id.* at 321. In characterizing such claims not as "pre-judgment interest," but as "profit from wrongly seized property," the Ninth Circuit can be said simply to have devised "a new name for an old institution." *$277,000 U.S. Currency*, 69 F.3d at 1493.

Larson, 274 F.3d at 647. The Eighth Circuit reasoned similarly: "[T]he no-interest rule [cannot] be dismissed by labeling the award * * * constructive

interest, or compensation for * * * loss of use of the property — 'the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution.'" *$7,990.00*, 170 F.3d at 845 (quoting *Shaw*, 478 U.S. at 321). The Second Circuit made no mention of the contrary holdings of the Sixth and Ninth Circuits, even though both of those holdings pre-dated the Second Circuit's decision. Instead, the court rejected the claim of entitlement to interest because: "Absent 'express Congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award.' There is no statutory basis for awarding prejudgment interest in this case." *Ikelionwu*, 150 F.3d at 239 (quoting *Shaw*, 478 U.S. at 314).

U.S. Shoe II presents the same issue as the one causing the split, even though it is not a forfeiture action. Like the forfeiture cases, *U.S. Shoe II* involves "benefits that [the United States] has actually and calculably received from an asset that it has been holding improperly." *$277,000*, 69 F.3d at 1498. The United States unconstitutionally took possession of the HMT export payments, held those payments in the Harbor Maintenance Trust Fund, and now enjoys the benefit of the interest earned on those payments. There is no dispute that: (a) the tax on exports was unconstitutional; (b) the Government has actually benefited from improperly taking and holding the money (and the exporter's have suffered by not having had benefit of the monies unconstitutionally exacted); and (c) the benefit is calculable. Nothing in the reasoning of any of the

circuit court cases is confined to forfeiture actions; instead, their reasoning applies as clearly to *U.S. Shoe II* as it does to cases of forfeiture. Both situations involve unlawful confiscations of money by the Government.

Because the circuits' reasoning applies to unlawful confiscations generally, U.S. Shoe would have been entitled to interest in the Sixth and Ninth Circuits, but would not have received interest in the First, Second, Eighth, and Tenth Circuits, even after the enactment of the new forfeiture statute by Congress. *See $30,000.25*, 236 F.3d at 613 (referencing the Civil Asset Forfeiture Reform Act of 2000, codified at 28 U.S.C. § 2465(b)(1)(C)). That statute does not resolve the split as it relates to U.S. Shoe. Outside of forfeiture actions, the split will continue whenever the Government unlawfully collects money from private citizens. This Court should grant the petition for writ of *certiorari* to resolve this conflict.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE OF WHEN AN UNCONSTITUTIONAL ACT IS EXEMPT FROM THE NO INTEREST RULE NEEDS TO BE CLARIFIED BY THIS COURT

In *United States v. United States Shoe Corporation*, this Court held that the harbor maintenance tax ("HMT") as it applied to exports violated the Export Clause of the United States Constitution. 523 U.S. 360, 370 (1998) ("*U.S. Shoe*

I"). That decision, however, only provided for a partial refund of the money paid under the HMT. As a result, although U.S. Shoe and others who paid the HMT on exports received a partial refund of money paid, they have not received the full refunds, including interest, to which they are entitled.

A. The Constitution Overrides The Government's Immunity From Interest

This Court has previously held that "[a]part from constitutional requirements, in the absence of specific provision by contract or statute, or express consent * * * by Congress, interest does not run on a claim against the United States. The 'constitutional requirement' arises in a taking under the Fifth Amendment." *Shaw*, 478 U.S. at 317 and n.5 (ellipses in original) (internal quotation marks omitted).

In previously holding that the Government lacks immunity from interest when it violates the Takings Clause, the Supreme Court has used a rationale that applies to violations of all constitutional provisions:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature

> of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.

Jacobs v. United States, 290 U.S. 13, 16 (1933). This Court in *Jacobs*, therefore, reasoned that statutory or contractual waiver of immunity from interest is unnecessary when the Government violates the Takings Clause simply because that clause is in the U.S. Constitution and imposes a duty to pay.

This Court's *dicta* from other cases also supports this view. *See United States v. Louisiana*, 446 U.S. 253, 264-65 (1980) ("Apart from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent * * * by Congress,' interest does not run on a claim against the United States.") (ellipsis in original); *see also Smyth v. United States*, 302 U.S. 329, 353 (1937) ("The rule is established that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the government even though there has been default in the payment of the principal. The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution.") (emphasis added).

This Court's *dicta* in other cases, however, indicate that the Takings Clause is the only

constitutional provision the violation of which provides for interest. *See United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951) ("[I]nterest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract. * * * The only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment. Only in such cases does the award of compensation include interest."); *see also Shaw*, 478 U.S. at 317 & n.5; *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 47 (1928) ("We start with the rule that the United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution.").

Despite such *dicta*, this Court has never held that only violations of the Takings Clause waive sovereign immunity. The Federal Circuit went too far in its narrow interpretation of *Shaw*, and this Court should grant the petition for a writ of *certiorari* to clarify the language in *Shaw* referring to the U.S. Constitution requiring the payment of interest.

B. The Export Clause Is A Constitutional Provision That Mandates The Waiver Of Sovereign Immunity

The Export Clause of the U.S. Constitution states that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, sec, 9,

cl. 5. In *U.S. Shoe I*, this Court held that the HMT as it applied to exports violated the Export Clause. *U.S. Shoe I*, 523 U.S. at 370. The Export Clause, therefore, is a constitutional provision which allows for the waiver of sovereign immunity and entitles those who paid the HMT on exports to interest in order to be fully compensated for the unconstitutional act by the United States.

The Federal Circuit held that the Export Clause was inapplicable as a constitutional provision providing for the waiver of sovereign immunity because the clause does not mention "just compensation." *U.S. Shoe II*, 296 F.3d at 1384-86. Carrying the Federal Circuit's analysis to its logical conclusion would mean that U.S. Shoe and other similarly situated companies would not even have been entitled to the refunds of the principal of the unconstitutional HMT.

Furthermore, in a different case, the United States Court of Federal Claims held that the United States owed a refund with interest to federal judges whose salaries were unconstitutionally reduced by social security taxes. *Hatter v. United States*, 38 Fed. Cl. 166, 181-83 (1997). In its opinion, the court reasoned:

> Resolution of the interest issue should not turn on whether the term "compensation" means the same thing in the Just Compensation Clause as in the Compensation Clause. Rather, the common denominator is that both clauses

> are contained in the Constitution. We find no principled basis to distinguish the constitutionally based entitlement to interest of takings plaintiffs from the constitutional position of federal judges. Both the Fifth Amendment and Article III affirmatively require the payment of compensation. If recompense for delay in compensation is required for takings claimants despite the general rule, surely the federal judge whose constitutionally protected compensation is delayed is at least equally entitled to such recompense.

Id. at 182 (emphasis added).

The Federal Circuit distinguished *Hatter* from *U.S. Shoe II* by stating that "[t]he construction of the Export Clause differs from the Compensation Clause" because "the word 'compensation' does not appear" in the Export Clause. *U.S. Shoe II*, 296 F.3d at 1385. The Federal Circuit ignored the obvious fact that other clauses in the U.S. Constitution require compensation by the Government, even though the word "compensation" does not appear in those clauses. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 51-52 (1990) (holding unanimously that the Due Process Clause gives rise to a requirement for compensation in the context of an unlawful tax statute). The Export Clause, like the Takings and Compensation Clauses, is a constitutional provision that waives sovereign immunity for the purpose of requiring the Government to fully compensate victims for its

violation.

Without interest, U.S. Shoe and others who paid the unconstitutional tax on exports will never be put in as good a position as if the unconstitutional tax had never been collected from them. The Federal Circuit, in *U.S. Shoe II,* too narrowly interpreted a constitutional provision's waiver of sovereign immunity, and this Court should grant the petition for writ of *certiorari* to clarify when the U.S. Constitution overrides the no interest rule of *Shaw*.

CONCLUSION

For these reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* AIR PRODUCTS AND CHEMICALS, INC., CLARK OIL TRADING COMPANY, DAIDO STEEL (AMERICA), INC., FEDERAL SIGNAL CORPORATION, THE GERBER PRODUCTS COMPANY, THE MELTON COMPANY, PERSECO ASIA-PACIFIC, L.L.C., ROBERT BOSCH TOOL CORPORATION, TENNECO AUTOMOTIVE INC., AND VARIAN MEDICAL SYSTEMS, INC. IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Did the United States violate the Takings Clause of the U.S. Constitution by retaining interest earned on the money it exacted from exporters pursuant to the unconstitutional Harbor Maintenance Tax?

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INTEREST OF *AMICI CURIAE*

Air Products and Chemicals, Inc., Clark Oil Trading Company, Daido Steel (America), Inc., Federal Signal Corporation, The Gerber Products Company, The Melton Company, Perseco Asia-Pacific, L.L.C., Robert Bosch Tool Corporation, Tenneco Automotive Inc., and Varian Medical Systems, Inc., *amici curiae* in this appeal, respectfully submit this brief in support of U.S. Shoe Corporation ("U.S. Shoe").[1]

Air Products and Chemicals, Inc. is a Delaware corporation. It serves customers in technology, energy, healthcare and industrial markets worldwide with a unique portfolio of products, services and solutions, providing atmospheric gases, process and specialty gases, performance materials and chemical intermediates.

Clark Oil Trading Company is a Missouri general partnership. It trades, transports and stores petroleum and petroleum products in various markets.

Daido Steel (America), Inc. is a Delaware corporation. It is the exclusive sales agent of Daido Steel Co., Ltd. in the United States. Daido Steel Co., Ltd. is one of the world's largest specialty steel producers.

Federal Signal Corporation is a Delaware corporation. It is a manufacturer and worldwide supplier of safety, signaling and communications equipment, fire rescue

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1. Petitioner has filed a global consent to the submission of *amicus curiae* briefs in support of either party, which is on file with the Clerk. Respondent's letter consenting to the filing of this brief accompanies this filing. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

products, street sweeping and vacuum loader vehicles, parking control equipment, carbide and superhard tipped cutting tools, precision metal stamping punches and components for plastic injection molds.

The Gerber Products Company is a Michigan corporation. In 1994, it merged with Sandoz Ltd. and is now a part of the Novartis group of companies. It is one of the world's leading baby food and products companies.

The Melton Company is a Texas corporation. It is a leading U.S. processor of lambskins.

Perseco Asia-Pacific, L.L.C. is a Delaware Limited Liability Company. It provides purchasing services for packaging products for the McDonald's restaurants system.

Robert Bosch Tool Corporation is a Delaware corporation. It is one of the world's premier power tool makers.

Tenneco Automotive Inc. is a Delaware corporation. It is one of the world's largest designers, manufacturers and distributors of automotive ride control and emission control products and systems for the automotive original equipment market, and the repair and replacement market, or aftermarket.

Finally, Varian Medical Systems, Inc. is a Delaware Corporation. It is one of the world's leading manufacturers of radiotherapy systems.

As significant U.S. exporters who have paid collectively Harbor Maintenance Taxes in excess of $4.8 million, *amici curiae* have an interest in the outcome of this appeal. *Amici curiae* agree with the Petitioner that the United States owes interest on the money it exacted pursuant to the unconstitutional Harbor Maintenance Tax.

SUMMARY OF ARGUMENT

The Fifth Amendment of the U.S. Constitution states that private property shall not "be taken for public use without just compensation." The Federal Circuit, in *United States Shoe Corporation v. United States*, 296 F.3d 1378 (2002), rejected plaintiff's argument that the government's refusal to refund interest on the Harbor Maintenance Tax ("HMT") exactions violated the Fifth Amendment, finding that interest on the refunds was not a private property interest protected by the Takings Clause. The Federal Circuit stated that the interest, like the HMT itself, became the property of the government upon payment and, therefore, was not an unconstitutional taking.

This Court's precedent, however, establishes that the interest earned on monies wrongfully exacted from taxpayers constitutes private property for purposes of the Takings Clause. The fact that the underlying statute instituting the HMT was found to be unconstitutional further warrants a finding of a taking by the government. "Just compensation" in this case consists, at a minimum, of the income earned by the government from the interest-bearing account into which the HMT was deposited. Support also exists for the remedy of interest on the funds paid by exporters, calculated from the date of their deposit at the statutory rate for interest on refunds of taxes and customs duties (*see* 26 U.S.C. § 6621).

Finally, in addition to the arguments set forth above, the Court should grant U.S. Shoe's petition for a writ of certiorari because of the disagreement among the federal courts of appeals over this issue.

ARGUMENT

A. The Money Earned as Interest on the HMT Qualifies as a Property Interest of U.S. Shoe.

For the Court to determine that the interest on the HMT retained by the government is a taking in violation of the Takings Clause of the Fifth Amendment, it must first be established that the interest qualifies as a property interest that is constitutionally protected. *See Ruckelhaus v. Monsanto Co.*, 467 U.S. 986, 1000-01 (1984).

The Court has established that the earnings of a fund such as that at issue in *U.S. Shoe* constitute a property interest for purposes of the Takings Clause. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), a company known as Eckerd's agreed to purchase Webb's Fabulous Pharmacies, Inc. but discovered at closing that Webb's debts appeared to be greater than the purchase price. To protect itself, and as allowed under Florida statute, Eckerd's interpleaded Webb's and Webb's creditors and tendered the purchase price to the Florida court. The clerk of the court charged a fee based on a percentage of the amount deposited for its services in connection with its receipt of the money into the registry of the court. The interest earned on the interpleader fund, which eventually totaled over $100,000, was not turned over to the receiver and it served as the basis of the action against Seminole County. The Supreme Court held that the retention of the interest was a taking which violated the Takings Clause of the Fifth Amendment.

Like the interest earned on the interpleader fund in *Webb's*, the interest in *U.S. Shoe* constitutes a property interest. The Court's characterization of the Florida court's refusal to refund the interest in *Webb's* is instructive:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish

> the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

Id. at 164.

The Federal Circuit in *U.S. Shoe* held that the HMT payment was not held by the government as a property of U.S. Shoe, but became the property of the government upon payment into the Harbor Maintenance Fund. The mere payment of the taxes into the HMT fund, according to the court, transformed the HMT paid into the property of the government, thereby extinguishing the private property interest of the exporters in the funds. *U.S. Shoe*, 289 F.3d at 1384. The Court, however, dismissed such an attempt by the Florida court in *Webb's*:

> [A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Webb's, 449 U.S. at 164.

The Court similarly rejected a state's appropriation of earned interest in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). In that case, Texas established a trust account into which an attorney must deposit client funds for

limited periods of time, and the normal interest earned on the funds was paid to a public foundation that finances legal services for low-income persons. The Court rejected the differing treatment of confiscatory regulations and those regulating property interests. "[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Id.* at 167. Without deciding the ultimate issue of whether the retention of the interest was a taking without just compensation, the *Phillips* Court determined that the interest on the deposited legal funds was the private property of the client for purposes of the Takings Clause.

The decisions in *Webb's* and *Phillips* clearly establish that the earned interest at issue in *U.S. Shoe* constitutes private property. As in *U.S.* Shoe, the statutes in each of these cases required the parties to remit funds to the government which were in turn held in interest-bearing accounts.

The property interest in *U.S. Shoe* is even more compelling than the interests at issue in *Webb's* and *Phillips* because the underlying statute in *U.S. Shoe* mandating the HMT on exportations was found to be unconstitutional. To withhold the payment of earned interest on HMT funds when the collection of the tax was deemed unconstitutional, but to grant the refund of interest when the underlying statute was lawful (as in *Webb's* and *Phillips*) would be a travesty of justice rewarding the government for its unconstitutional acts.

The Federal Circuit in *U.S. Shoe* unconvincingly distinguished the property interests found in *Webb's* and *Phillips* from that at bar. Citing *Phillips*, the court concluded that "[f]or the accrued interest to rise to the level of private property, the principal must be held in an identified private account." *U.S. Shoe*, 296 F.3d at 1384. The monies deposited into the Harbor Maintenance Trust Fund, according to the

court, were not held by the government as property of the claimants but, rather, "became the property of the Treasury upon payment." Thus, the court held, any interest earned on the remitted funds also became the property of the government.

The Federal Circuit's requirement that the funds be "held" by the government as property of U.S. Shoe is without precedent. The Takings Clause protects an interest that *is* private property, not one that is *held* as private property. The holding of the HMT money by the government as its own in *U.S. Shoe* is no different from the holding of the funds by the state in *Webb's*. The government in both cases retained earned interest that it never lawfully possessed. The only difference between the cases – *viz.*, that the state in *Webb's* laid claim unjustifiably to a *temporary* property right in the money, whereas the government in *U.S. Shoe* laid claim unjustifiably to a *permanent* property right in the money – is plainly without significance. To conclude otherwise would privilege particularly egregious violations of property rights over merely wrongful violations of those rights.

It is irrelevant that the export exactions were commingled in the Harbor Maintenance Trust Fund with the money reaped from the valid HMT on imports. The statute enacting the HMT directed that the export fees must be placed in the Harbor Maintenance Trust Fund, which is a discrete interest-bearing account. Like the HMT fees, the interest on the taxes paid is sufficiently identifiable in the fund for purposes of refunding it to exporters. It is important to note that the interest at issue in *Webb's* and *Phillips* was similarly commingled with the principal of the corresponding funds and was not maintained by the state governments in separate and discrete accounts.

B. The Unlawful Exaction Constitutes a *Per Se* Taking Rather Than a Regulatory Taking.

The U.S. Supreme Court has recognized two different categories of takings under the Takings Clause of the Fifth Amendment, a "*per se* taking" (also referred to as a "classic taking") and a "regulatory taking." In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court described a *per se* taking as one in which "the government directly appropriates private property for its own use," and a regulatory taking as one in which the government's "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[2]

The retention of interest earned by the government qualifies as a *per se* taking because the government held the monies in the Harbor Maintenance Trust Fund for its own use. The Court has held that the retention of interest is a *per se* taking in two other cases with takings similar to that in *U.S. Shoe*. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In contrast, the government's appropriation of the interest was not "some public program adjusting the benefits and burdens of economic life to promote the common good" and, therefore, does not qualify as a regulatory taking.

The Supreme Court's decision in a recent case provides further compelling support that the retention of the interest on the money in the Harbor Maintenance Trust Fund was a

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2. In determining a "regulatory taking," the Court considers three factors: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 123-24 (1978).

per se taking rather than a regulatory taking. In *Brown v. Legal Foundation of Washington*, 2003 WL 1523550 (U.S. 2003), the Court completed its decision that began as *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), concerning the payment of interest earned on clients' funds while those funds are held in attorneys' trust ("IOLTA") accounts. In *Brown*, the Court determined that if the act of giving the interest to the Washington Legal Foundation was a taking, then it was a *per se* taking. The Court reasoned that since "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal," transfer of the interest to the Legal Foundation of Washington constituted a physical taking subject to a *per se* analysis. *Id.* at *11, quoting *Phillips*. Accordingly, the government's taking of the interest earned on the Harbor Maintenance Trust Fund is a *per se* taking that requires just compensation.

C. Because the Supreme Court has Ruled the HMT Unconstitutional, the Court Should Disregard the Law Authorizing the Collection of the Fee and Hold that the Retained Interest Violates the Takings Clause.

Prior to the Court finding the HMT unconstitutional, the government collected the HMT and deposited the funds in an interest-bearing account. Once this Court struck down the HMT, the government's retention of the interest earned without just compensation from the date that the interest began accruing violated the Takings Clause. As Justice Scalia wrote in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) (Scalia, J. concurring):

> [W]hat a court does with regard to an unconstitutional law is simply to *ignore* it. It decides the case '*disregarding the [unconstitutional] law*,'

> because a law repugnant to the Constitution 'is void, and is as no law.' Thus, if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy.

Id. at 760. *See also Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 320 (1987); and *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002).

Thus, the Federal Circuit's refusal in *U.S. Shoe* to compensate exporters for the interest on the HMT funds is without merit. The unconstitutional law instituting the HMT was void from the moment of its enactment, and the government should have ignored the law from that point for purposes of determining just compensation for the taxpayers. The Federal Circuit's failure to recognize the interest as U.S. Shoe's property and authorize its refund reveals the court's great deference to the unconstitutional law itself. The court should have, instead, treated the HMT as a tax that never existed and acknowledged that U.S. Shoe never relinquished its property right in the HMT funds remitted, or the interest on the funds.

D. *U.S. Shoe* Must Receive Just Compensation for the Government's Taking of the Interest on the HMT.

The Takings Clause of the Fifth Amendment requires that "private property [must not] be taken for public use without just compensation." *U.S. Const. amend. V.* Thus, if the Court finds that the interest on the HMT qualifies as a property interest that has been taken unconstitutionally by the government, the government must provide "just compensation" for the taking.

The Court has routinely found that when there is a taking under the Fifth Amendment, the plaintiff must be compensated beyond the principal amount that was taken by the government. *See, e.g., Albrecht v. United States*, 329 U.S. 599 (1947) "[W]here payment of that fair market value is deferred, it has been held that something more than fair market value is required to make the property owner whole, to afford him 'just compensation'." *Id.* at 602. The term "just compensation" was interpreted by the Court in *Webb's, supra*, to equal the actual interest earned on monies that were unlawfully taken and held by the government. In the case of U.S. Shoe, the government deposited the HMT into an interest-bearing account and tens of millions of dollars have been earned on the funds to date. The government should not be allowed to retain the profits earned on a tax that was unconstitutionally imposed and coercively collected.

A compelling argument can be made that, to make U.S. Shoe "whole," the government must refund interest for the period extending from the date that HMT was collected to the date of refund. The Federal Circuit in *U.S. Shoe* acknowledged: "[t]he principle that the 'just compensation' language includes the payment of interest from the time of the taking is long standing." (*citing Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923)). Regardless of the method employed to calculate interest in this case, it is incontrovertible that the government must make the plaintiff whole by refunding interest on the HMT funds that were unlawfully exacted.

The Court's refusal to refund the interest earned on the IOLTA trust accounts in *Brown, supra*, does not dictate the result in this case. In *Brown*, the Court ruled that the plaintiffs were not deprived of "just compensation" because such compensation would amount to nothing after the costs of

paying it had been expended.[3] Clearly, because the actual interest earned on the HMT far exceeds the administrative costs of refunding that money, *U.S. Shoe* is governed by *Webb's* rather than by *Brown*. Accordingly, the government took the interest earned on the HMT collected from *U.S. Shoe* without paying the company just compensation.

E. The Court Should Grant U.S. Shoe's Petition for a Writ of Certiorari Because the Federal Courts of Appeals are Split in Their Enforcement of the Takings Clause.

The circuit courts have differed in their interpretation of the Supreme Court's decisions in *Webb's* and *Phillips* when considering whether prisoners are entitled to the interest earned on trust accounts into which their personal funds are deposited. The Ninth Circuit has found a property interest in the interest earned by prisoners that was unconstitutionally taken by the government. The Fourth and Tenth Circuits, however, have reached the opposite conclusion.

In *Schneider v. California Department of Corrections*, 151 F.3d 1194 (9th Cir. 1998), the Ninth Circuit considered the constitutionality of the State of California's refusal to refund to prisoners the interest earned on personal monies deposited into a trust fund during their incarceration. Relying specifically on *Webb's* and *Phillips*, the court held that the inmates "possess a constitutionally recognizable property interest that triggers Takings Clause scrutiny." *Id.* at 1201.

The Fourth Circuit specifically acknowledged its divergence from the Ninth Circuit in *Schneider* when it refused, for purposes of the Takings Clause, to recognize as

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3. In *Brown*, the interest earned on the IOLTA funds attributable to a client was such a nominal amount that the administrative cost of refunding the interest exceeded any interest earned.

private property interest earned on prison inmate accounts. In *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000), the appeals court found that the interest at issue was not a private property interest at common law but, instead, was an interest created by statute. "His property interest was that given by statute, and the State never took from him what was created by statute. Therefore, there was not a taking of private property as addressed in the Fifth Amendment." *Id.* at 186.

The Tenth Circuit similarly rejected plaintiff's claim of a constitutionally protected property interest under the Takings Clause with respect to interest on prison inmate funds. "[B]ecause neither Oklahoma state law nor any other 'independent source' provide Mr. Petrick a constitutionally protected property interest in interest earned on funds in his draw or mandatory savings accounts, his claim must fail." *Petrick v. Fields*, 1996 U.S. App. LEXIS 313338, at 7 (10th Cir. 1996).

Although U.S. Shoe's petition does not present a question identical to the issue regarding which the circuits are split, the resolution of the question presented by U.S. Shoe would resolve the disagreement among the courts of appeals. For this reason, the Court should agree to hear *U.S. Shoe*. The Ninth Circuit's finding of a constitutionally protected property interest in *Schneider* is the holding most in accord with the Supreme Court's decisions in *Webb's* and *Phillips*. The Fourth and Tenth Circuits' findings that state law limited the plaintiffs' property interest in the income generated from the prison inmate funds directly contradicts the Supreme Court's refusal to allow a state to circumvent the Takings Clause "by recharacterizing the principal as 'public money.'" *Webb's*, 449 U.S. at 164.

CONCLUSION

For the reasons stated above, *amici curiae*, Air Products and Chemicals, Inc., Clark Oil Trading Company, Daido Steel (America), Inc., Federal Signal Corporation, The Gerber Products Company, The Melton Company, Perseco Asia-Pacific, L.L.C., Robert Bosch Tool Corporation, Tenneco Automotive Inc., and Varian Medical Systems, Inc. respectfully request that the Court reverse the lower court's judgment that the exporters which deposited HMT, found to be unconstitutional by the Court, are not entitled to interest on the HMT refunds.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF PLAINTIFFS' STEERING COMMITTEE, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Amicus Curiae adopts the statement of the questions presented in the petition except to note with respect to question 1 that approximately 10,500 claims for interest will be affected by the outcome of this case as more particularly explained herein.

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I. THE GOVERNMENT DID NOT RAISE THE INTEREST ISSUE IN THE FIRST APPEAL OF THIS CASE TO THE SUPREME COURT NOTWITHSTANDING THAT THE JUDGMENT FROM WHICH THE APPEAL WAS TAKEN PROVIDED A REFUND OF THE HMT "WITH INTEREST AS PROVIDED BY LAW." 6

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IV. THE FACTORS WHICH LED TO THE GRANTING OF CERTIORARI IN THE FIRST PHASE OF THIS CASE, COUPLED WITH THE CLEAR CONGRESSIONAL INTENT TO AWARD INTEREST IN 28 U.S.C. § 2411 AND 19 U.S.C. § 1505, REQUIRE THAT THE PETITION BE GRANTED TO CORRECT THE ERROR OF THE FEDERAL CIRCUIT'S REFUSAL TO AWARD INTEREST 14

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INTEREST OF *AMICUS CURIAE*[1]

This brief is filed by plaintiffs' Steering Committee as *amicus curiae* in support of the Petition for Writ of Certiorari filed by United States Shoe Corporation. When the litigation of the challenge to the Harbor Maintenance Tax on exports (HMT) was commenced by a number of plaintiffs in the Court of International Trade, the Court called together a group of approximately 12 attorneys who had brought the suits to assist it in selecting a test case for the litigation of the challenge to the HMT. After this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), most of the group was formally constituted as a plaintiffs' Steering Committee (hereinafter: "Committee") under the aegis of the Court of International Trade. The Committee represents hundreds of exporter plaintiffs that have obtained refunds of the HMT who, like all similarly situated exporters, have a direct stake in the outcome in that case and the further proceedings before this Court herein. The Committee's members were selected by Judge Jane A. Restani to assist the Court in the case management of the many suits that were filed and the refund administration issues following the Supreme Court's decision in *United States Shoe* and the subsequent favorable decision in *Swisher International v. United States*, 205 F.3d 1358 (CAFC), *cert. denied*, 531 U.S. 1036 (2000)).

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[1] Petitioner has filed a global consent to the submission of *amicus* briefs in support of either party, which is on file with the Clerk. Respondents' letter consenting to the filing of this brief accompanies this filing. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Members of the Committee participated as *amicus curiae* in all stages of *United States Shoe* and worked closely with counsel for United States Shoe in coordinating the challenge in the Court of International Trade and the appellate courts. The Committee has also acted on behalf of the Court as the central information clearinghouse for the hundreds of other attorneys representing the many thousands of claimants challenging the imposition of the HMT.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case by the petitioner, United States Shoe Corporation.

SUMMARY OF ARGUMENT

There was manifest Congressional intent to provide for interest on HMT refunds as refunds of either a tax or duty (it is considered both under the enacting statute). The decision of the Supreme Court in this case held that the HMT was a tax and, for certain purposes, considered a Customs duty. Congress manifestly intended to award interest on such refunds under the provisions of the tax code awarding interest on tax refunds, 28 U.S.C. § 2411, and under the provisions of the Customs laws awarding interest on duty refunds, 19 U.S.C. § 1505. The decision of the Federal Circuit frustrates this congressional intent and is at odds with the decision of this Court recognizing the HMT on exports as an unconstitutional tax or duty on which interest should be refunded.

The impact of the decision in this case will affect the outcome of over 10,500 claims pending before the courts and the Customs Service. The failure to award interest is a gross injustice especially when viewed against the extraordinary delays by the Customs Service in refunding

the principal. In over half of the claims, not even the principal has been refunded notwithstanding the decision of the Supreme Court over five years ago holding the HMT on exports to be unconstitutional.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

INTRODUCTION

In this brief we hope to assist the Court by providing an overview of the complicated procedural history of this case and its impact on the interest issue. We also hope to demonstrate to the Court why the government has willfully delayed the issuance of refunds further exacerbating the injustice of the failure to award interest on the refund of this unconstitutional tax.

As a prelude to this overview, the Committee respectfully submits that the following are compelling reasons why the Petition for Writ of Certiorari should be granted:

- The decision of this Court in this case, 523 U.S. 360 (1998), affirmed the judgment of the Court of International Trade which awarded a money judgment of the Harbor Maintenance Tax "together with interest and costs as provided by law."
- For reasons advanced in the petition, the Constitution provides that interest should be awarded on refunds of this unconstitutional tax.

- As also contended in the petition, Congress provided for interest on a refund of the HMT whether it is deemed a tax, 28 U.S.C. § 2411, or a duty, 19 U.S.C. § 1505.
- The error of the Court of Appeals for the Federal Circuit in denying the award of interest will never become apparent by reason of conflicts with other circuits, because the Court of International Trade "has exclusive jurisdiction over challenges to the HMT." 523 U.S. 366, footnote 3; 28 U.S.C. § 1581(i)(4). See also 28 U.S.C. § 1581(a).
- The egregiousness of the injury to plaintiffs by reason of the failure to grant interest has been magnified by the willful refusal of the U.S. Customs Service to process refund claims by thousands of exporters on a timely basis.
- From the time the HMT was first imposed in mid 1987 until exporters were relieved from paying the tax after the decision of the Supreme Court in this case, exporters have paid collectively about 1.434 billion dollars in HMT.
- In the more than five years since this Court decided that the HMT was an unconstitutional violation of the export clause, less than half out of approximately 10,500[2] claims have even been reviewed by Customs much less the subject of full or partial refunds.
- The government can continue to act with impunity in its dilatory processing of the refund claims because it is not accumulating interest charges.
- The complicated jurisdictional hurdles to bringing an action to obtain a refund of the principal now prevent plaintiffs from being able to commence actions in the

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[2] The petition for the writ of certiorari understates the number of claims by only counting the administrative claims which numbered approximately 7,500. In addition to those administrative claims, approximately 3,000 claims are pending in the Federal courts. The total number of judicial and administrative claims, therefore, is approximately 10,500.

Court of International Trade to compel timely issuance of the refunds, even without interest.

- The award of interest on the pending claims in the courts and before Customs administratively has been conditioned by the Court of International Trade and the Customs Service upon a decision of the Courts mandating an award of interest.
- In the absence of the granting of this Petition for a Writ of Certiorari and a final resolution of the issue by this Court, the issue of interest will continue to clog the calendars of the Courts in related cases presently on appeal.
- The resolution of the interest issue by the Court in this case, the lead test case on the challenge to the constitutionality of the HMT, would likely resolve the question in many of those cases including *International Business Machines Corp. v. United States*, 201 F. 3d. 1367 (Fed. Cir. 2000), *reh. denied*, 2000 U.S. App. LEXIS 15299 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001), 25 CIT ___, SLIP OP. 2002-17, 2002 Ct. Int'l. Trade LEXIS 16, *aff'd* 2003 U.S. App. LEXIS 5396 (Fed. Cir., March 19, 2003); *Hohenberg Bros. Co. v. United States*, 23 CIT ___, SLIP OP. 2000-172, 2000 Ct. Int'l. Trade LEXIS 173, *aff'd* 301 F. 3d 1299, 2002 U.S. App. LEXIS 17644 (Fed. Cir. 2002), *reh. denied*, 2002 U.S. App. LEXIS 24345 (Fed. Cir. Nov. 4, 2002); *Swisher International, Inc. v. United States and Sony Electronics Inc., and, Arbon Steel & Service Co., Inc. v. United States*, 178 F. Supp. 2d 1354, 24 CIT ___, SLIP OP. 2001-144, 2001 Ct. Int'l. Trade LEXIS 151, *judgment entered sub nom. Arbon Steel & Service Co. v. United States*, 25 CIT ___, SLIP OP. 2002-8, 2002 Ct. Int'l. Trade LEXIS 7, *aff'd* 315 F.3d 1332, 2003 U.S. App. LEXIS 337 (Fed. Cir. 2003); *Eastman Chemical Company v. United States*, Ct. No. 95-04-00568.

I. THE GOVERNMENT DID NOT RAISE THE INTEREST ISSUE IN THE FIRST APPEAL OF THIS CASE TO THE SUPREME COURT NOTWITHSTANDING THAT THE JUDGMENT FROM WHICH THE APPEAL WAS TAKEN PROVIDED A REFUND OF THE HMT "WITH INTEREST AS PROVIDED BY LAW."

From the outset, the question of interest was a vital issue in the case especially in view of the great period of time that the tax had been in effect and the likelihood of protracted litigation of secondary issues in the case. This is important to a consideration of the merits of the instant Petition for a Writ of Certiorari. It must be emphasized that the initial judgment of the Court of International Trade provided a refund of the HMT "with interest as provided by law." *United States Shoe Corp. v. United States*, 924 F. Supp. at 1192. That judgment was subsequently affirmed by the Supreme Court decision in this case. With full knowledge that it intended to challenge the interest award separately, the government remained silent on the interest claim throughout the appeal in the initial phase of this case confining its defense to the jurisdictional and constitutional issues. When Justice Ginsburg asked the Deputy Solicitor General during oral argument as to whether any cases were in the pipeline involving the issue, the government responded that there were none. 1998 US Trans LEXIS 58 at *19. To completely answer this question, this Court should have been advised that the interest question, the other half of the case, was in the pipeline and that subsequent to the initial decision in the Court of International Trade, Judge Restani had rendered a "MEMORANDUM OPINION" affirming the award of interest. *United States Shoe Corp.* v. *United States*, 20 CIT 206 (1996). While it is questionable that this separate action by Judge Restani, who was only one of the three judges who rendered the decision in *United States Shoe*, was

appropriate, this action resulted in the interest issue becoming the subject of separate litigation.

As a result of the unconventional bifurcation of the claim for the principal and interest by Judge Restani's Memorandum Opinion, the interest issue took on a life of its own. When this case was returned to the Court of International Trade for entry of a final judgment after consideration of plaintiff's motion for an order settling interest and costs, the Court awarded the principal and costs but stayed the award of interest pending appeal or the expiration of appeal time from the Memorandum Opinion issued as Slip Op 96-32, 22 CIT 613, 614 (1998). To complicate matters even more, the interest appeal in this case was further stayed pending a resolution of the interest issue in *International Business Machines Corp. v. United States*, *supra*, which remains pending.

II. THE FINAL RESOLUTION OF THE INTEREST ISSUE IN THIS CASE WILL LIKELY RESOLVE THE ISSUE IN APPROXIMATELY 10,500 CLAIMS PENDING BEFORE THE COURTS AND THE CUSTOMS SERVICE.

When a host of suits were commenced in the Court of International Trade in the latter part of 1994, the correct jurisdictional path to adjudication of the claims was far from clear. Most of the suits were commenced claiming jurisdiction under 28 U.S.C. § 1581(i). In some cases, exporters such as United States Shoe Corp. filed protests against the assessment of the HMT and claimed additional jurisdiction under 28 U.S.C. § 1581(a) as well as 28 U.S.C. § 1581(i). Yet another group of exporters brought suit claiming jurisdiction only under 28 U.S.C. § 1581(a) and followed a far more layered administrative process leading to denied protests which formed the basis for section 1581(a) jurisdiction. This last group followed the procedures which

were the subject of litigation in *Swisher International, Inc. v. United States*, 205 F.3d 1358 (CAFC, 2000) *cert. denied*, which was not allowed to proceed until after this Court's decision in the *United States Shoe* case.

Because the *United States Shoe* case involved a claim for jurisdiction under both section 1581(a) and section 1581(i), that case was selected by Judge Restani with the agreement of the Committee as the "test case". This resulted in an Order by the three judge panel in *United States Shoe* designating that case for adjudication of the issues and staying all other cases, including the *Swisher* case, pending resolution of the *United States Shoe* case. *United States Shoe Corp. v. United States,* 19 CIT 288 (1995). Because the Federal Circuit ultimately found jurisdiction in *United States Shoe* to lie only under section 1581(i), refunds could not be obtained on HMT payments made more than two years prior to the date on which the actions were commenced. 28 U.S.C. § 2636(i). Since most of these actions were commenced no later than the latter part of 1994, refunds were not possible under this jurisdictional basis for exports made prior to the latter part of 1992 and in most cases, much later dates. Ultimately, the award of interest under 28 U.S.C. § 2411 was reversed in the *IBM* case (while the interest question in this case remained stayed).

Now comes the *Swisher* case. It was only after the final decision was rendered by this Court in *United States Shoe* that Judge Restani permitted the *Swisher* case to proceed. *United States Shoe Corp. v. United States*, 22 CIT 880, 882 (1998).

As mentioned above, the *Swisher* case proceeded on a different procedural and jurisdictional track than even the section 1581(a) jurisdiction claimed in *United States Shoe.* In *Swisher*, a claim for a refund was first filed with Customs

pursuant to administrative procedures set forth in 19 C.F.R. § 24.24(f) covering all payments back to 1987 when the HMT was first imposed. Customs uniformly refused to recognize those claims and denied them summarily. Thereafter, protests under 19 U.S.C. § 1514, which are a pre-condition to section 1581(a) jurisdiction, were filed against the denial of the refund claims. Ultimately, those protests were denied and only at that time could actions be commenced in the Court of International Trade following the *Swisher* theory.[3] That jurisdictional theory ultimately succeeded. *Swisher International, Inc. v. United States, supra.* By reason of the fact that the refunds were ordered pursuant to jurisdiction under section 1581(a) in contradistinction to *United States Shoe* where jurisdiction was found only under section 1581(i), post summons interest was granted under 28 U.S.C. 2644.[4] However, pre-summons interest was denied for the same reasons that it was denied in *United State Shoe.* See, the claims resolution and refund procedure established by Judge Restani in the wake of the *Swisher* case, *Swisher International, Inc. v. United States,* 25 CIT __, Slip Op. 2001-29, 2001 Ct. Intl. Trade Lexis 35 (2001). Under this procedure, exporters with Swisher-type claims then pending in the Court of International Trade could obtain refunds of the principal with post summons interest but the stipulated judgments granted pre-summons interest only upon the condition subsequent of "a schedule set by the Court should trial or appellate court proceedings in any of the following

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[3] The denied protests in *United States Shoe* which formed the underlying basis of the claim for jurisdiction under section 1581(a) were protests against the assessment of the HMT itself rather than Swisher-type protests against the denials of the refund claims.

[4] Only approximately 250 exporters having Swisher-type claims pending in court were able to avail themselves of the opportunity to obtain post summons interest. Hence, virtually all of the 10,500 claimants have received no interest payments at all in connection with HMT refunds. Incredibly, the government has not even paid the principal, much less interest, to most of the claimants with pending Swisher-type claims.

cases, finally resolve that such interest is owing on HMT payments" naming those cases cited, *supra*, *Swisher International, Inc. v. United States, International Business Machines Corp. v. United States; Hohenberg Bros. Company v. United States, Sony Electronics, Inc. v. United States, United States Shoe Corp. v. United States, Arbon Steel and Service Co. v. United States, Eastman Chemical Company v. United States* [citation to court numbers omitted].

In the wake of this Court's decision in *United States Shoe,* Judge Restani implemented a similar claims resolution procedure under which refunds of the principal in claims under section 1581(i) could be obtained. *United States Shoe Corp. v. United States,* 22 CIT 737 (1998). Under that procedure, no post summons interest was granted and pre-summons interest was conditioned on the issuance of "a schedule set by the court should appellate court proceedings in *International Business Machines Corp. v. United States,* 1998 Ct. Intl. Trade Lexis 73, Court No. 94-10-00625 finally resolve that interest is owing on HMT payments." *Id.* at 741. The resolution of the interest issue in this case would likely impact heavily on the decision in the *IBM* case, which remains pending and which, upon information and belief, will be the subject of a petition for a writ of certiorari shortly. Thus, this case has the potential impact of resolving the interest issue for all 10,500 claims.

III. THE INORDINATE DELAY BY THE CUSTOMS SERVICE IN PROCESSING THE REFUNDS OF THE PRINCIPAL FURTHER DEMONSTRATES THE APPROPRIATENESS OF AN AWARD OF INTEREST ON THE CONSTITUTIONAL AND STATUTORY GROUNDS ADVANCED IN THE PETITION.

The fundamental unfairness of the refusal to award interest is further compounded by the extremely complicated procedural and jurisdictional background of the

case. When *Swisher* was favorably decided for the exporters by the Court of Appeals for the Federal Circuit and certiorari was denied, Customs stopped summarily denying the Swisher-type claims. It was at this point that Customs began its torpid administrative processing of the claims, over half of which remain untouched more than five years after this Court rendered its decision holding the tax unconstitutional. Those claims continue to be processed to this date at a snail's pace--according to the government at a rate of 300 per month and according to empirical evidence gathered by the Committee at a much slower rate of less than 200 per month. See, *Eastman Chemical Co. et al. v. United States,* 27 CIT ___, Slip Op. 2003-39, 2003 Ct. Intl. Trade Lexis 38 (April 3, 2003).

Furthermore, plaintiffs are precluded now from forcing these claims into Court since the claims for the earlier HMT payments are no longer possible under section 1581(i) by reason of the statute of limitations in 28 U.S.C. § 2636(i) and because the Swisher-type claims have not been denied, a necessary precondition to a right of protest and subsequent judicial review a la *Swisher* under section 1581(a). In other words, by now "processing" the Swisher-type claims instead of denying them summarily as in the past, the government gets to hold onto the unconstitutionally collected HMT for as long as it wants. When a group of frustrated plaintiffs brought an action for mandamus seeking an order requiring Customs to hire more personnel or to devote more presently employed personnel to process the Swisher-type claims, their motion for mandamus was denied. *Eastman Chemical Co., et al. v. United States, supra.* Plaintiffs are now kept out of Court on HMT claims filed after *Swisher* was decided and the government is sitting on the payments which were collected in violation of the Constitution. This includes the vast majority of HMT claims.

The claims which are processed do not award interest and are issued with a statement that interest would only be granted in the event of a future decision by the Courts holding that interest must be paid. In view of the fact that interest has been denied on both statutory and constitutional grounds by the lower courts, there is no pressure on the government to process the claims more quickly and this tardiness is rewarded by having the use of these funds and gaining interest thereon.

United States Shoe's petition for a writ of certiorari will control the outcome of over 10,500 claims. Interest will be awarded on 7,500 administrative claims if, and only if, the Supreme Court reverses the Federal Circuit by ruling that interest is due. Similarly, the availability of interest on approximately 3,000 judicial claims that follow in the footsteps of United States Shoe depends on the outcome of this petition and a decision of this Court. First, if the Supreme Court rules that United States Shoe were owed interest, then the court would, as a matter of course, remand *IBM* to the CIT with instructions to that Court to issue a decision consistent with the new rule of law set down in *United States Shoe*. IBM would accordingly receive interest, as would the approximately 3,000 similarly situated exporters.

Second, a victory for *United States Shoe I* in the Supreme Court would pave the way for these 3,000 companies to receive interest regardless of the effect such a victory would have on the fortunes of IBM. The terms of the stipulated judgments issued in the format prescribed by the claims resolution procedure following United States Shoe dictate that these 3,000 exporters will receive interest if "appellate court proceedings in [*IBM*] finally resolve that interest is owing on HMT payments" -- not that these exporters will be deprived of interest if IBM is so deprived. Indeed, Judge Restani explained specifically in a colloquy

with the Committee at the time the claims resolution procedure was under consideration that a win by IBM would be a win for all, and a loss by IBM would bind no other exporter. This is established practice in the CIT when that Court designates a "test case." In any event, the 3,000 court claims that involve executed stipulated judgments in accordance with the procedure constitute only about one third of the total interest at stake in the total 10,500 claims. Some of those exporters have claims totaling as much as $23 million.

In addition to the *IBM* case, other cases mentioned earlier are noteworthy and would also be resolved if this petition were granted: *Arbon Steel & Service Co. v. United States, supra*, and *Hohenberg Bros. Co. v. United States, supra*. Counsel for petitioners in the *Arbon* case and the *Hohenberg* case have requested, or will request, this Court to suspend action on their petitions for a writ of certiorari pending this Court's decision on *United States Shoe's* petition for a writ of certiorari. The plaintiff company in A*rbon* sought interest on HMT payments on grounds almost identical to those advanced by United States Shoe. Both the CIT and the Federal Circuit ruled against the plaintiff. See, *Arbon, supra*, 178 F. Supp. 2d 1354 (2001); *Arbon Steel & Serv. Co. v. United States*, Appeal No. 02-1299 (CAFC, January 10, 2003). On appeal to the Federal Circuit, Arbon advanced a novel argument that immunity of the United States from interest has never applied to overpayments of internal revenue taxes and that 28 U.S.C. § 2411 merely codifies that rule. The Federal Circuit rejected the argument noting (1) "the Supreme Court * * * has determined that section 2411 does not codify such a rule, but itself serves as a waiver of immunity (*Arbon* Appeal No. 02-1299, citing *Library of Congress v. Shaw*, 478 U.S. 310, 319); and (2) section 2411, which "relates to internal-revenue taxes, * * * does not apply here" because the tax laws do not

govern the HMT relying on its own decision in *IBM*, 201 F. 3d at 372.

The plaintiffs in *Hohenberg Bros. Co. v. United States, supra*, were also among those exporters who entered stipulated judgments to obtain refunds conditioned upon the *IBM* case under the post United States Shoe claims resolution procedures. Hohenberg and its co-appellants asked the Federal Circuit to modify their judgments in light of *Swisher*, so that they would be able to receive interest under 28 U.S.C. § 2644. The Federal Circuit held, however, that "[b]y executing the [consent] judgment, Hohenberg * * * expressly waived all future claims arising out of its HMT export payments against the government" (301 F. 3d 305) because the judgments included this clause: "upon entry of judgment, plaintiff releases, waives, and abandons all claims against the defendant * * * arising out of all HMT export payments." *Id.* at 304. Hence, the ultimate outcome of the *IBM, Arbon* and *Hohenberg* and any other future cases involving the interest issue will be fundamentally affected by the decision in this case as will the potential award of interest on all 10,500 claims.

IV. THE FACTORS WHICH LED TO THE GRANTING OF CERTIORARI IN THE FIRST PHASE OF THIS CASE, COUPLED WITH THE CLEAR CONGRESSIONAL INTENT TO AWARD INTEREST IN 28 U.S.C. § 2411 AND 19 U.S.C. § 1505, REQUIRE THAT THE PETITION BE GRANTED TO CORRECT THE ERROR OF THE FEDERAL CIRCUIT'S REFUSAL TO AWARD INTEREST.

The factors that led to the granting of certiorari to the government in the initial phase on the merits of this case apply as well with respect to the award of interest. In that case, certiorari was granted in large part because some 4,000 cases raising this claim were currently stayed in the

CIT. 523 U.S. 360, 365 n.2 (1998). Now no less than 10,500 claims, both judicial and administrative, hang in the balance awaiting the outcome of the decision on the pending petition for certiorari. It is noteworthy that when the government argued for a grant of certiorari on the merits in the first phase of this case, it emphasized the very conditions that are equally present at this stage of the case; namely, -- this case will decide the outcome of thousands of other cases, which collectively involve hundreds of millions of dollars; and no circuit split can arise because the Federal Circuit, by reason of the CIT's exclusive jurisdiction, has jurisdiction over all of the cases.

In filing for certiorari in the first phase of this case, the government argued that "this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance," No. 97-372, *Pet. for Cert.* 25, and the government cited, as examples, three cases that *did not involve* constitutional challenges to federal statutes. In the first of these, *United States v. Hill*, 506 U.S. 546 (1993) (No. 91-1421), the government argued as follows (Pet. for Cert. 9):

> The decision in this case misapplies the text and history of section 57 of the Internal Revenue Code to reach an illogical conclusion with dramatic fiscal consequences. The Federal Circuit's decision was issued by a court with nationwide jurisdiction. Since all taxpayers with tax preference income are entitled to pay the tax and sue for refund in the Federal Circuit, and since such taxpayers tend to be professionally counseled, it is unlikely that other courts of appeal will have an opportunity to review this same issue. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions that have great fiscal

> importance. *** Such review is appropriate in this case.

The circumstances in this case are even more compelling for a grant of certiorari than those in *Hill*, because the Federal Circuit is the *only* court in which a challenge to the HMT *can possibly be made.*

In the *Hill* case, the government went on to assert (*Pet. for Cert.* 12-14):

> The fiscal consequences of the decision in this case are enormous. Absent review by this Court, the decision of the Court of Appeals will significantly frustrate the plain intent of Congress . . . .

The government's petition in the *Hill* case also made reference to the decisions in *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989) (No. 88-1474) and *United States v. American Bar Endowment*, 477 U.S. 105 (1986) (No. 85-599), both involving provisions of the Internal Revenue Code rather than constitutional issues. In its petition for certiorari in *Goodyear Tire & Rubber*, the government argued (*Pet. for Cert.* 8):

> The Court of Appeals has erroneously held that Congress intended the term "accumulated profits" in Section 902 of the code to mean a foreign country's definition of taxable income. The Court's decision thus overturns the construction of the statute that has long been settled. Moreover, the decision is seriously antithetical to the purposes of the statute and will reintroduce some of the disparities in tax treatment that it was designed to eliminate and this major disruption of the statutory scheme rests on an unusually weak foundation – a "plain meaning" discussion that

> manifestly misunderstands the operation of the Section 902 credit.
>
> While the Court of Appeals' decision involves a technical issue, it will have enormous deleterious consequences on the public fisc and on the fair administration of the tax laws if it is permitted to stand * * * [T]he decision below is by a court of nationwide jurisdiction.

Everything that the government argued in *Goodyear Tire & Rubber Co.* applies equally here. The Federal Circuit decision overturned the decision of the CIT which relied on the comprehensive language of Section 2411 to provide interest on *any* refund of *any* taxes imposed under the Internal Revenue Code. Section 2411 provides that:

> In *any* judgment of *any* court rendered *** against the United States *** for *any* overpayment in respect of *any* internal-revenue tax, "*interest shall be allowed . . .*"[Emphasis added]

The HMT is an internal revenue tax imposed under the Internal Revenue Code, 26 U.S.C. § 4461-4462, and is plainly encompassed by the above quoted language. The frustration of the Congressional intent to award interest on such refunds is based essentially on the Federal Circuit's interpretation of the plain meaning of the statute which misunderstands the manifest Congressional intent to award interest on refunds of both taxes and Customs duties. As stated by the government in its petition for certiorari (*Pet. for Cert.* 26):

> [R]eview by this Court is warranted to correct the Court of Appeals' error and restore even-handed administration of this important aspect of the tax laws.

Finally, we submit that the language of the government's petition in the *American Bar Endowment* case, *supra*, applies equally in this case (*Pet. for Cert.* 15):

> [T]he Federal Circuit has ignored both the express language of section 513(c) and Congress' intention in enacting the unrelated business income tax.

In a nutshell, the Federal Circuit's opinion in *IBM* which formed the basis for the decision in this case constitutes a tortured statutory interpretation of section 2411 of Title 28 and section 1505 of Title 19 which completely frustrates manifest congressional intent to award interest on refunds of the HMT. Clearly, section 2411 provides for interest on refunds of any taxes imposed under the Internal Revenue Code, and the HMT, whatever else it may be, is most certainly a tax. As this court noted in the first phase of this case (523 U.S. at 367):

> The HMT bears the indicia of a tax. Congress expressly described it as "a *tax* on any port use," 26 U.S.C. § 4461(a) (emphasis added), and codified the HMT as part of the Internal Revenue Code.

If by reason of any oversight in statutory draftsmanship, Congress failed to make clear that refunds of this tax were to be awarded with interest under section 2411, then the provision for refunds of Customs duties with interest in section 1505 surely fills in the gap. As further noted by this Court in its opinion (*ibid.*):

> *** In like vein, Congress provided that, for administrative, enforcement, and jurisdictional purposes, the HMT should be treated "as if [it] were a Customs duty." §§ 4462(f)(1)(2).

Therefore, by treating the HMT as though it were a Customs duty in these limited circumstances, Congress also brought it within the purview of section 1505 which provides for an award of interest on a refund of Customs duties. One way or the other, Congress enacted statutory provisions under which any refunds of the HMT would be accompanied by interest. To hold otherwise, as did the Federal Circuit in *IBM* and this case, flies in the face of a clear congressional intent to the contrary as well as the decision of this Court which treats the HMT as both a tax and Customs duty and which affirmed the decision of the CIT which awarded a money judgment in this case "with interest as provided by law."

CONCLUSION

We respectfully submit that the Federal Circuit erred in reversing the decision of the Court of International Trade and holding that interest should not be awarded on refunds of the Harbor Maintenance Tax on exports. For the reasons set forth herein and in the petition for a writ of certiorari, the writ of certiorari should be granted.

Respectfully submitted,

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No. 02-1221

IN THE

Supreme Court of the United States

United States Shoe Corp.,
Petitioner,
v.
United States of America
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF ELLIOTT TURBOMACHINERY COMPANY, INC., NASHUA CORPORATION, AND VENTURE COKE COMPANY AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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April 22, 2003

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INTEREST OF AMICI CURIAE

The *amici curiae* submitting this brief are, like Petitioner United States Shoe Corporation, exporters of commercial goods by ocean vessel.[1] Their claims for interest on illegally collected federal Harbor Maintenance Taxes on exports remain before the Court of International Trade while this test case is litigated. They have a financial stake in the outcome of the question for which review is sought – whether petitioner is entitled to interest on refunds of Harbor Maintenance Taxes collected in violation of the Constitution.

This *amicus curiae* brief is being filed with the consent of all parties. Petitioner has filed a global consent to the submission of amicus briefs in support of either party, which is on file with the Clerk. Respondent's letter consenting to the filing of this brief accompanies this filing..

STATEMENT

This case concerns the federal Harbor Maintenance Tax (HMT), 26 U.S.C. §§ 4461-62, an ad valorem tax

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[1] No counsel for any party authored any part of this brief. No persons other than *amici curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

The *amici curiae* are Elliott Turbomachinery Company, Inc., Nashua Corporation and Venture Coke Company.

imposed since 1987 on merchandise imported into, and exported from, the United States by ocean vessel. In *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that the tax, as imposed on exports, was unconstitutional as a violation of the Export Clause (art. I, § 9, cl. 5) of the Constitution of the United States.

On remand following this Court's holding of unconstitutionality of the export HMT, the Court of International Trade granted Petitioner's motion for interest on its refund of illegally collected HMT payments. *United States Shoe Corp. v. United States*, Pet. App. 111a-113a. The Court of Appeals for the Federal Circuit, relying on an earlier decision denying interest on HMT refunds (*IBM Corp. v. United States*, 201 F. 3d 1367 (Fed. Cir. 2000), reversed the award of interest, holding that neither 28 U.S.C. §2411 (authorizing interest when a court orders a refund of internal revenue taxes), any other statute, nor the United States Constitution provided a basis for Petitioner to receive interest on refunded Harbor Maintenance Taxes. *United States Shoe Corp. v. United States*, 296 F. 3d 1378 (2002).

SUMMARY OF ARGUMENT

Title 28 USC §2411 provides, simply and directly that, "[I]n any judgment of any court rendered . . . for any overpayment in respect of any internal revenue tax, interest shall be allowed from the date of payment . . . . " The Court of Appeals' conclusion that Congress excluded the HMT from the purview of this interest statute is wrong. The HMT, codified in the Internal Revenue Code, is an internal revenue tax, and 28 U.S.C. § 2411 applies to internal revenue taxes. While the HMT was to be subject to the

administrative and enforcement provisions of the customs laws, the interest provisions of 28 U.S.C. § 2411 (a section of the judicial code) remain applicable to it. The Court of Appeals' contrary decision attributes to Congress an intent to deny to taxpayers interest on refunds of these unconstitutionally collected taxes, an intent which Congress has never manifested under either the internal revenue or customs laws.

ARGUMENT

I. The Court of Appeals Misread the Governing Statute

A. The Legislative Setting of the HMT

The HMT is a statutory hybrid. The obligation to pay taxes on the value of merchandise imported and exported by sea was enacted into the Internal Revenue Code, Title 26 U.S.C., but Congress provided that the administrative and enforcement provisions of the customs laws were to apply to it: [A]ll administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] as if such tax were a customs duty." 26 U.S.C. § 4462(f)(1). The statute also provided, correlatively, that the HMT "shall not be treated as a tax for purposes of subtitle F [of the Internal Revenue Code] or any other provision of law relating to the administration and enforcement of internal revenue taxes." 26 U.S.C. §4462(f)(3).

Thus, the HMT was given its legislative birth in the tax code, where it remains, but it was to be administered and enforced as part of the customs laws of the United States. Since Congress has provided for interest on refunds of

internal revenue taxes (28 U.S.C. §2411), and has provided for interest on refunds of customs duties (19 U.S.C. §§ 1505(c), (d)), one would have thought that one or both of these statutes would authorize interest on refunds of export HMT overpayments. But the Court of Appeals held otherwise, concluding that neither statute authorized such interest.

B. The Statute Authorizing Interest on Court Ordered Internal Revenue Tax Refunds Applies to Refunds of Export-Related HMT Payments.

The Court of International Trade held that interest was owed on HMT refunds under 28 U.S.C. §2411, a provision not of the tax code but of the judicial code. The statute reads as follows:

> In any judgment of any court rendered . . . for any overpayment in respect of any internal revenue tax, interest shall be allowed from the date of payment . . . .

There was no sound reason for the Court of Appeals to hold this interest statute inapplicable to export HMT refunds. First, the HMT is an internal revenue tax – Congress labeled it a tax and enacted in into the Internal Revenue Code. This Court viewed the HMT as a tax in the first *U.S. Shoe* case, 523 U.S. at 367, and the Court of Appeals for the Federal Circuit, in *IBM Corp. v. United States*, 201 F. 3d 1367, 1372 (CAFC 2000), was explicit on this point: "Thus both the structure and content of the HMT point toward it being an internal revenue tax . . . ."

As such, it would appear to follow that Section 2411 should apply to HMT refunds. But the Court of Appeals disagreed. It adopted the reasoning of *IBM* that the language of the HMT statute -- excluding from application to the HMT the administrative and enforcement provisions of the internal revenue laws, and applying to the HMT the administrative and enforcement provisions of the customs laws – precluded the applicability of Section 2411.

But in order to reach such a conclusion, one must first conclude that Section 2411 relates "to the administration and enforcement of internal revenue taxes." Again, the Court of Appeals adopted the reasoning of the *IBM* court that Section 2411 did so relate.

But such a conclusion does not withstand analysis. First, Section 2411 is not even located in the Internal Revenue Code. Instead, it is located in Title 28 of the United States Code (Judiciary and Judicial Procedure), and provides for interest on tax refunds ordered as a result of court proceedings. As such, Section 2411 is a provision of law concerning the administration of justice, not the administration of the internal revenue taxes, and so the exclusion from the HMT of "any other provision of law relating to the administration and enforcement of internal revenue taxes" (26 U.S.C. §4462(f)(3)) does not apply to this provision of the judicial code.

Second, the terms "administration" and "enforcement" simply do not describe the interest authorization of Section 2411. Black's Law Dictionary defines "administration" as "management or conduct" and "enforcement" as "[t]he act of putting something, such as a law, into effect; the execution of a law." (Black's Law Dictionary 44, 528 (6th ed. 1990).) The Internal Revenue

Service (IRS) manages and enforces the internal revenue tax sustem: Among other things, it collects the taxes and follows administrative procedures for refunding overpayments. When such administrative procedures fail, however, and a *court* orders the government to pay interest on the refund of a tax overpayment under Section 2411, the *court* is neither "managing" nor "putting into effect" the underlying taxes. It is providing a *judicial* remedy for an excessive tax collection. Section 2411 thus does not relate to the "administration and enforcement" of internal revenue taxes, and so was not excluded from the HMT statute by 26 U.S.C. §4462(f)(3).

The government may offer another argument why Section 2411 does not apply to refunds of export HMT payments: the exclusion of administration and enforcement provisions of the tax laws extends to Section 2411 because the HMT's adoption of the administration and enforcement provisions of the customs laws (26 U.S.C. §4462(f)(1)) supplants every internal revenue tax statute that might otherwise apply. But since the government has consistently argued that no interest provision of the customs laws applies to export HMT refunds, and the Court of Appeals for the Federal Circuit has agreed with that position in the case below, 296 F. 3d at 1381-82, Section 2411 has not (at least according to the court below) been replaced by another interest statute. It remains, as the Court of International Trade originally held, as an interest statute that applies to export HMT refunds.

CONCLUSION

The petition for a writ of certiorari should be granted, to consider whether 28 U.S.C. §2411 authorizes interest to be paid on refunds of unconstitutionally collected Harbor Maintenance Taxes. Denial of the petition would leave standing a remarkably unfair decision that Congress' enactment of an internal revenue tax statute, to be administered and enforced as a customs law, was exempt from Congress' general authorization to pay interest on court-ordered refunds of internal revenue taxes.

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IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Association of Exporters and Importers ("AAEI"), by its filing of this brief as *amicus curiae*, respectfully urges this Court to grant the petition for a writ of certiorari.[1]

Founded in 1921, AAEI is a national association of over 1,000 U.S. firms that are involved in exporting products from, and importing products into, the United States. AAEI's member companies export, import, distribute and manufacture a broad range of products, including chemicals, electronics, machinery, footwear, automobiles and parts, food, household consumer goods, toys, specialty items, textiles and apparel. In addition, many organizations serving the international trade community, including customs brokers, freight forwarders, banks, attorneys, insurance firms and carriers, are active members of AAEI.

AAEI is often called upon by Congressional committees to offer its technical expertise on policy and regulatory matters impacting global commerce. The Association and its member companies have an abiding interest in U.S. laws affecting international trade and their adherence to the Constitution. This case is significant for AAEI because many of its exporter members have obtained refunds of unconstitutionally exacted Harbor Maintenance Taxes

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1. Petitioner has filed a global consent to the submission of *amicus curiae* briefs in support of either party, which is on file with the Clerk. Respondent's letter consenting to the filing of this brief accompanies this filing. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

("HMT") under this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), but have been denied interest on those refunds based on the decision of the United States Court of Appeals for the Federal Circuit below, in *United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002).

While AAEI endorses all of the arguments raised by U.S. Shoe in its petition, it confines its discussion in this brief to the Export Clause of the Constitution as a basis for interest on HMT refunds.

SUMMARY OF THE ARGUMENT

The United States' general immunity from the payment of interest absent a waiver of sovereign immunity to such an award does not apply when the Government is required to pay interest under the Constitution.

This Court has consistently held that the Takings Clause of the Fifth Amendment requires the payment of interest, a result grounded in this Court's underlying determination that "just compensation" for a governmental taking of private property must be the "full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). That determination is itself a reflection of the fact that the restriction on Congress' power contained in the Takings Clause "must be enforced according to its letter and spirit and to the full extent." *Fairbank v. United States*, 181 U.S. 283, 301 (1901).

This Court has similarly emphasized that the restriction in the Export Clause — "No Tax or Duty shall be laid on Articles exported from any State" — "should be enforced in

accordance with its letter and spirit," *Fairbank*, 181 U.S. at 290, with the "aim[] ever to show fidelity to the * * * purpose" of this provision. *Id.* at 289. A Government response to a violation of the Export Clause that consists of a refund of tax principal as required under the Clause, but without interest, violates the letter and spirit of the Export Clause no less than a Government payment without interest violates the letter and spirit of the Takings Clause.

The Export Clause was intended to ensure (1) "that exports should not be made a source of revenue to the National Government," and (2) "that the National Government should put nothing in the way of burden upon such exports." *Fairbank*, 181 U.S. at 292-93. Application of the no-interest presumption violates both purposes, as this case profoundly illustrates. Although refunds of the HMT principal were issued following this Court's unanimous decision, earlier in this case, that the tax violated the Export Clause, exporters have borne the burden of $700 million in lost interest on sums that should never have been taxed in the first place, while the Government has retained millions of dollars in interest that it earned on the HMT. Thus, the Federal Circuit's decision allows the Government to extract what amounts to interest-free loans from exporters — a clear subversion of the letter and spirit of the Export Clause. Accordingly, review by this Court of the Federal Circuit's decision is necessary.

ARGUMENT

I. The Government's Immunity From The Payment Of Interest Is Inapplicable When Interest Is Required Under The Constitution.

Generally speaking, the United States is immune from a requirement to pay interest unless Congress has waived its sovereign immunity to such an award separate from a general waiver of immunity to suit. *See, e.g., Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986). However, as this Court has observed, the "no-interest" rule does not apply when the Government is required to pay interest under the Constitution. *E.g., id.* at 317 ("*Apart from constitutional requirements*, in the absence of specific provision by contract or statute, or 'express consent * * * by Congress,' interest does not run on a claim against the United States.") (emphasis added) (quoting *United States v. Louisiana*, 446 U.S. 253, 264-65 (1980), quoting *Smyth v. United States*, 302 U.S. 329, 353 (1937)). Indeed, although this Court has previously denied requests for interest on the ground that the Government did not waive its immunity,[2] none of those cases involved a violation by the Government of a constitutional provision.

No provision of the Constitution expressly requires the payment of interest. This Court, nonetheless, has consistently held that a waiver of immunity from interest is unnecessary

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2. *E.g., Shaw*, 478 U.S. at 323; *United States v. Louisiana*, 446 U.S. at 264-65; *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 47 (1928); *United States v. North American Transp. & Trading Co.*, 253 U.S. 330, 335-36 (1920); *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 260 (1888); *Harvey v. United States*, 113 U.S. 243, 249 (1885); *United States v. Sherman*, 98 U.S. 565, 568 (1878).

under the Takings Clause of the Fifth Amendment, which provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. *See, e.g.*, *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933) (citing cases). Despite dicta in a few cases that the Takings Clause is the only constitutional provision whose violation gives rise to interest,[3] this Court has never held that the Government's immunity from interest extends to other provisions of the Constitution, let alone a violation of the Export Clause, whose "simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." *United States v. United States Shoe Corp.*, 523 U.S. 360, 368 (1998) ("*U.S. Shoe I*"). The Federal Circuit's decision, which extends the Government's immunity from interest to the Export Clause, radically undercuts the unqualified protection that the Framers afforded exports by virtue of this Clause, and it should therefore be reviewed by this Court.

II. Interest On Refunds Of Unconstitutionally Exacted Harbor Maintenance Taxes Is Required To Fulfill The "Letter and Spirit" Of The Export Clause.

A. This Court Has Made Clear That The Export Clause Should Be Construed Broadly To Ensure That Congress Neither Burdens Exports Nor Benefits Financially By Taxing Them.

The Export Clause states: "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The inclusion of the Export Clause in the Constitution was one of the most important and actively debated issues

3. *See Shaw*, 478 U.S. at 317 & n.5; *Tillamooks*, 341 U.S. at 49; *Boston Sand*, 278 U.S. at 47.

at the Constitutional Convention of 1787. "We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution." *Fairbank v. United States*, 181 U.S. 283, 290 (1901).

Several delegates refused to vote in favor of the Constitution if the Clause was not included. *See* Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 95, 360 (rev. ed. 1966). Others declared that they would vote to grant Congress the power to tax only if exports were exempted entirely. *See id.* at 305-06. Despite opposition, *id.* at 223, and attempts to limit the exemption, *id.* at 359-63, the Export Clause was adopted as an absolute prohibition against any tax or duty on exports. *See id.* at 220 ("the hands of the Legislature were absolutely tied * * * — exports could not be taxed") (statement of Rufus King of Massachusetts); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1011, at 470 (1833) ("Story *Commentaries*") ("The power is, therefore, wholly taken away to intermeddle with the subject of exports.").

Thus, over a century ago, this Court observed that

> the purpose of the restriction is that exportation, all exportation, shall be free from national burden. * * * [I]t is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.

Fairbank, 181 U.S. at 292-93. The *Fairbank* Court emphasized that this "restriction on the power of Congress

* * * should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed." *Id.* at 290.

B. The Federal Circuit's Denial Of Interest Based Upon A Narrow Reading Of The Export Clause Is Contrary To This Court's Construction Of The Clause And Enables Congress To Thwart The Framers' Intent.

Ignoring this Court's admonition that the Export Clause should be enforced with its purpose kept squarely in mind, the Federal Circuit interpreted the Export Clause *narrowly* and held that, even though "a violation of the Export Clause requires a return of the money excised," it does not require the payment of interest. *United States Shoe Corp. v. United States*, 296 F.3d 1378, 1385 (Fed. Cir. 2002) ("*U.S. Shoe II*"). The court endorsed an incomplete monetary remedy and distinguished the Export Clause from the Takings Clause on the ground that the prohibition in the Takings Clause "is coupled with the restorative clause, 'without just compensation,'" whereas the Export Clause's prohibition "lacks similar remedial language." *Id.* (citation omitted). The Federal Circuit was "unwilling" to infer a requirement to pay interest under the Export Clause, "where the word 'compensation' does not appear." *Id.*

The Federal Circuit's denial of interest based on its narrow, mechanical reading of the Export Clause is at odds with this Court's recognition that the Export Clause is to be given a broad construction in order to fulfill its purpose:

> [I]f the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally

> imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. * * * The true spirit of constitutional interpretation in both directions is to give full, liberal construction of the language, aiming ever to show fidelity to the spirit and purpose.

Fairbank, 181 U.S. at 289.

Far from being distinguishable from the Export Clause, the Takings Clause requires the payment of interest based on this same principle. In *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), this Court recognized that "just compensation" required under the Fifth Amendment in the event of a governmental taking must be the "full and perfect equivalent for the property taken." *Id.* at 326.[4] Applying *Monongahela*, this Court subsequently determined that "the full equivalent of that value paid contemporaneously with the taking" must include interest. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923). As the *Fairbank* Court noted, *Monongahela* simply recognized in the context of the Takings Clause what *Fairbank* recognized in the context of the Export Clause: "In short, the court held in [*Monongahela*] that Congress could not by any declaration

4. The Court noted that even "if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property." 148 U.S. at 326.

in its statute avoid, qualify or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent." 181 U.S. at 301. Thus, when this Court held in *Seaboard Air Line* that "just compensation" must include interest, it, like the *Monongahela* Court before it, was simply enforcing the Takings Clause "according to its letter and spirit and to the full extent." *Fairbank*, 181 U.S. at 301.

Interest is required to fulfill the letter and spirit of the Export Clause no less than it is required to fulfill the letter and spirit of the Takings Clause, even though the Export Clause does not, as the Federal Circuit noted, contain the word "compensation." By levying an unconstitutional tax on exports and then refusing to pay interest on refunds of the money unlawfully exacted — refunds that even the Federal Circuit agrees are required notwithstanding the absence of express remedial language in the Export Clause — the Government has, contrary to the clear intent of the Framers, made exports "a source of revenue to the National Government" and put a "burden upon such exports." *Fairbank*, 181 U.S. at 292-93. Far from a hypothetical concern, this is *precisely* what unfolded in this very case. Even after the refund of the HMT principal,[5] the withholding of interest has resulted in the loss of some *$700 million* from the pockets of exporters, while at the same time the Government has retained millions of dollars in interest that *it* earned on the HMT principal prior to its refund. Consistent with "the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result,"

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5. Thousands of HMT claimants are, in fact, still awaiting a full refund, much less interest.

Fairbank, 181 U.S. at 294, just as the Government may not burden exports or benefit financially by imposing the HMT itself, it may not do so by refusing to pay interest on HMT refunds.[6]

The Federal Circuit's decision enables the Government to easily circumvent the purpose of the Export Clause, secure in the knowledge that it may enact a tax on exports, enjoy the fruits of its ill-gotten gains for many years, and, at the end of the day, have to refund the principal alone. The Federal Circuit thus approved the Government's extraction of interest-free loans from exporters and, in the process, created a most bizarre constitutional scheme: When the Government takes private property for public use — conduct that is *not prohibited* under the Constitution — it must pay interest as part of the compensation required to be paid, but when it taxes exports — conduct that is *categorically barred* under the Constitution — the Government need not pay interest when it issues the constitutionally required refund of taxes. Surely the Framers, who understood that they had "wholly taken away [Congress' power] to intermeddle with the subject of exports," Story *Commentaries* § 1011, at 470, would not have countenanced such a scenario.

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6. By contrast, the Government presumably could maintain immunity from interest in cases arising under *other* constitutional provisions which, unlike the Export Clause, do not, by their own terms, explicitly or implicitly include a monetary remedy. The Federal Circuit has held that numerous constitutional provisions are not money-mandating. *E.g.*, *Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997) (Fourth Amendment); *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (Due Process Clauses of Fifth and Fourteenth Amendments, Equal Protection Clause of Fourteenth Amendment, and separation of powers doctrine); *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) (First Amendment); *Terran v. Secretary of Health and Human Serv.*, 195 F.3d 1302, 1310 (Fed. Cir. 1999) (Presentment Clause).

C. The Federal Circuit's Narrow Reading Of The Export Clause Cannot Be Reconciled With This Court's Broad Reading Of The Clause In Its 1996 *IBM* Decision Or Its Decision In *U.S. Shoe I*.

The Federal Circuit mistakenly concluded that its treatment of the Export Clause is supported by this Court's decision in *United States v. International Bus. Mach. Corp.*, 517 U.S. 843 (1996). Citing the absence of the word "compensation" from the Export Clause, the Federal Circuit denied interest on HMT refunds on the ground that it was "follow[ing] the express textual command of the Export Clause." *U.S. Shoe II*, 296 F.3d at 1385 (quoting *IBM*, 517 U.S. at 862). The court's assumption that the "express textual command" of the Export Clause should be read narrowly is incorrect, *see* discussion *supra*, and, in fact, *IBM* itself confirms just the opposite. *See* 517 U.S. at 859-60 ("While the original impetus may have had a narrow focus, *the remedial provision that ultimately became the Export Clause does not*, and there is substantial evidence from the Debates [in the Constitutional Convention] that proponents of the Clause fully intended the breadth of scope that is evident in the language.") (Emphasis added).

Nor is the Federal Circuit's narrow reading of the Export Clause supported by its reliance on the *IBM* Court's observation that there is "good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence" because "[m]eaningful textual differences exist [which] should not be overlooked." *U.S. Shoe II*, 296 F.3d at 1385-86 (quoting *IBM*, 517 U.S. at 857). As the *IBM* Court noted, those textual differences were meaningful because they confirmed that the Export Clause affords *broader* protection to exports than does

the Import-Export Clause. *See* 517 U.S. at 857 (noting that "the Import-Export Clause is 'not written in terms of a broad prohibition of every 'tax,'" but merely prohibits State "imposts" and "duties" on exports, which "are narrower terms than tax") (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290 (1976)). Thus, in its earlier decision in this case, this Court quoted the very language from *IBM* upon which the Federal Circuit relied, but for a contrary proposition: to illustrate that the breadth of the Export Clause prohibition "distinguishes it from other constitutional limitations on governmental taxing authority," *U.S. Shoe I*, 523 U.S. at 368, and thus renders it a more stringent limitation on governmental exactions than either the Takings Clause or the Dormant Commerce Clause. *Id.* at 368-69. The Federal Circuit violated that decree by depriving the Export Clause of the power imbued in the Takings Clause to negate the presumption of immunity from interest. The result created by the Federal Circuit's decision is therefore plainly anomalous: How can the Export Clause constitute a more stringent limitation on governmental exactions than the Takings Clause if only the Takings Clause prevents the Government from depriving people of the interest on such exactions?

D. A Lower Court's Award Of Interest To Federal Judges Under The Compensation Clause Persuasively Illustrates That The Rationale For Interest May Be Extended To Certain Constitutional Provisions Other Than The Takings Clause.

The reasoning of a decision by the United States Court of Federal Claims supports U.S. Shoe's argument that the rationale for interest under the Takings Clause applies with equal force under certain other provisions in the Constitution.

In 1997, that court held that the United States owed interest on a tax refund to federal judges under the Compensation Clause, U.S. CONST. art. III, § 1, when their salaries were unconstitutionally diminished by social security taxes in violation of that Clause. *See Hatter v. United States*, 38 Fed. Cl. 166, 181-83 (1997). After observing that both the Takings Clause and the Compensation Clause are constitutional provisions requiring the payment of compensation, the court concluded: "If recompense for delay in compensation is required for takings claimants despite the general rule, surely the federal judge whose constitutionally protected compensation is delayed is at least equally entitled to such recompense." *Id.* at 182.[7]

The Federal Circuit assumed *arguendo* that *Hatter* was correctly decided, but it distinguished that case on the ground that "[t]he construction of the Export Clause differs from the Compensation Clause. The Export Clause is prohibitive, 'No Tax or Duty shall be laid on Articles exported from any State,' while the Compensation Clause requires that judges shall receive 'Compensation.'" *U.S. Shoe II*, 296 F.3d at 1385. This reasoning is unsustainable. Even the Federal Circuit has had no difficulty acknowledging that the Export Clause restriction on taxing power requires Congress to refund money obtained in violation of the Clause, and a refund of export taxes without interest is no more an adequate response to a violation of the Export Clause than the payment of

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7. As the Federal Circuit noted in this case, the Government did not appeal the Court of Federal Claims' award of interest in *Hatter*. Upon the Government's appeal of a subsequent decision on the merits of the judges' action under the Compensation Clause, this Court struck down the 1983 imposition of social security taxes on the judges' salaries, ensuring that the judges will receive refunds of those taxes plus interest. *United States v. Hatter*, 532 U.S. 557 (2001).

compensation without interest is an adequate response to a governmental diminution of judicial salaries. Only the payment of interest will ensure that the Government cannot circumvent the mandatory and unconditional prohibition contained in each Clause.

The Federal Circuit also distinguished *Hatter* on the ground that the Court of Federal Claims' rationale, that interest is required under the Compensation Clause to maintain the separation of powers, "does not apply to the Export Clause." *U.S. Shoe II*, 296 F.3d at 1385. The Federal Circuit made the wrong inquiry. It is not whether interest under the Export Clause would fulfill the *same* purpose that it fulfills under the Compensation Clause; clearly, the two Clauses were adopted for different reasons. Rather, the pertinent question is whether the purpose of the *Export Clause* would be defeated if the no-interest presumption were applied to that Clause. The Federal Circuit's denial of full monetary redress, *i.e.*, tax principal plus interest, for the Government's violation of the Export Clause substantially impairs the capacity of the Export Clause to achieve its purpose. In this sense, the Export Clause parallels both the Takings Clause and the Compensation Clause.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Association of Exporters and Importers respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 02-1221

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

UNITED STATES SHOE CORP., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICI CURIAE CHEVRONTEXACO, INC. ET AL. IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), upon written consent of all parties, *amici curiae* ChevronTexaco Inc., et al. hereby submit this brief in support of Petitioner United States Shoe Corp., and urge that the petition for a writ of *certiorari* be granted.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are exporters of waterborne commercial cargo who paid the Harbor Maintenance Tax ("HMT"), which this Court unanimously struck down as unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). Each of them received United States Court of International Trade ("CIT") judgments awarding them refunds of tax principal, plus interest. However, payment of interest has been stayed pending a final judicial determination

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[1]. *Amici curiae* on whose behalf this brief are filed are: ChevronTexaco Inc. and its affiliates Chevron USA Inc.; Chevron Chemical Company Inc.; Chevron Chemical International Sales Inc.; Chevron International Oil Company; Chevron Overseas Petroleum Company, Inc.; Crompton Corporation; Del Monte Foods, Inc.; Eastman Chemical Company, Inc.; Fieldston Clothes, Inc; General Mills, Inc.; Marconi Systems (f/k/a/ Gilbarco, Inc.); Michelin North America, Inc.; Rockwell International Corporation: Totes-Isotoner Corporation; and Xerox Corporation.

Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with this Court under separate cover. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than the listed *amici* made a monetary contribution to the preparation or submission of this brief.

concerning whether, and to what extent, the government must pay interest on refunds of this unconstitutional tax.

In addition, *amici* have each filed applications with the United States Customs Service pursuant to 19 C.F.R. § 24.24(d) (2001), seeking refunds of additional HMTs not covered by the CIT judgments. Pursuant to Customs' regulation, these refunds are being paid without interest, pending a final judicial determination concerning whether interest is payable.

The Court's decision in this case will almost certainly govern the determination of whether *amici* are entitled to receive interest with respect to refunds of the export HMTs they paid. Accordingly, the interests of *amici* – and thousands of other exporters who paid the export HMT – are co-extensive with those of Petitioner.

SUMMARY OF ARGUMENT

In statutes governing the administration and enforcement of the HMT, Congress has waived the government's sovereign immunity and has required that interests of excess HMTs be refunded with interest. The Federal Circuit erred in failing to recognize and apply the governing interest provision.

In the *Water Resources Development Act*, 26 U.S.C. § 4462(f)(1)("WRDA") which imposed the HMT, Congress directed that the HMT was to be treated, for administration and enforcement purposes, "as if such tax were a customs duty." The WRDA adopted, by extension, all administration and enforcement provisions of the Customs laws, and made them applicable to the HMT. Section 505 of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1505), which unquestionably

pertains to the "administration and enforcement" of customs duties, mandates the payment of interest on refunds of all excess customs duties collected. The Federal Circuit erred in failing to read these related statutes *in pari materia*, and frustrated Congressional intent by failing to award interest to Petitioner.

The Federal Circuit's error is particularly glaring, since Congress in 1993 expanded 19 U.S.C. § 1505's waiver of sovereign immunity to require that interest be paid on *all* refunds of excess customs duties. Congress must be presumed to have understood that this expanded waiver applied to the HMT, because the legislature had previously specified, in the WRDA, that the HMT be treated as a customs duty for § 1505's administration and enforcement purposes.

The Federal Circuit's decision also contravenes this Court's admonition that the Export Clause of the Constitution (U.S. Const., Art. 9, Cl. 5), which prohibits the taxation of all exports, must be "enforced in accordance with its *letter and spirit.*" *United States v. Hvoslef*, 237 U.S. 1, 15 (1915). By requiring the government to return the principal sums of the HMTs unconstitutionally exacted from exporters, but allowing the government to retain for itself the time-value of those sums, the Federal Circuit not only frustrated specific Congressional intent, but also the explicit command of the Framers that no burden of any kind be placed on exports. *See Fairbank v. United States*, 181 U.S. 283 (1901).

The petition for *certiorari* in this case raises significant legal issues, as well as Constitutional issues of first impression. Given the importance of these issues, and the fact that the Court's decision in this case will likely affect the refund claims of thousands of other exporters who were unconstitutionally taxed (and whose claims involve hundreds

of millions of dollars), *amici* submit that the writ should be granted.

STATEMENT

Amici curiae respectfully file this brief on consent of all parties in support of petitioner United States Shoe Corp., urging that this Court grant the request for issuance of a writ of *certiorari* to the Court of Appeals for the Federal Circuit.

Amici curiae concur with the Statement of the Case set forth in petition for *certiorari*.

REASONS FOR GRANTING THE WRIT

A. Congress Has Expressly Waived the Government's Sovereign Immunity and Required the Payment of Interest on Refunds of Harbor Maintenance Taxes

The government must pay interest on money it owes if it has by statute waived its sovereign immunity. *Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986). Section 505 of the Tariff Act of 1930, *as amended* (19 U.S.C. §1505) contains such a waiver with respect to Customs duties, directing the Customs Service to "refund any excess monies deposited, together with interest thereon, as determined upon a liquidation or reliquidation." *Id.*, §1505(b).[2] The Water

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[2] Section 505(b) of the Tariff Act establishes the government's obligation to pay interest on refunds of excess Customs duties, while Section 505(c) identifies the time period for which interest is calculated and paid.

Resources Development Act ("WRDA"), which imposed the HMT, expressly requires that "all administrative and enforcement provisions of [the] Customs laws and regulations shall apply in respect of the tax . . . (and in respect of persons liable therefor) **as if such tax were a customs duty**." 26 U.S.C. § 4462(f)(1) (emphasis added).

The WRDA, 26 U.S.C. § 4462(f) extends the

Section 505(b) (19 U.S.C. §1505(b)) provides that:

> The Customs Service shall collect any increased or additional fees due, together with interest thereon, or **refund any excess monies deposited, together with interest thereon**, as determined on a liquidation or reliquidation. Duties, fees and interest determined to be due on liquidation or reliquidation are due 30 days after the issuance of the bill for such payment. Refunds of excess moneys deposited, **together with interest thereon**, shall be paid within 30 days of liquidation or reliquidation. Emphasis added.

Section 505(c) (19 U.S.C. §1505(c)) states that:

> Interest assessed due to an underpayment of duties, fees or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits such estimated duties, fees and interest . . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation.

administration and enforcement provisions of the Tariff Act, including 19 U.S.C. § 1505, to the HMT. When the two statutes are properly read *in pari materia*, it is clear that interest must be paid on refunds of the HMT, just as interest is paid on refunds of customs duty.

However, the Federal Circuit ruled that 19 U.S.C. § 1505, "does not apply to exports because it speaks only to imports." Pet. App. at 6a. Following its decision in *International Business Machines Co. v. United States*, 201 F.3d 1367, 1374 (Fed. Cir. 2000), *cert. den.*, 531 U.S. 1182 (2002), the Federal Circuit admitted that Section 1505 was a law relating to the "administration and enforcement" of customs duties, but ruled that it did not apply to the HMT, since it speaks of excess duties "determined on a liquidation or reliquidation" of a customs "entry." 19 U.S.C. § 1505(b),(c). "Entry," "liquidation" and "reliquidation" are statutory terms of art associated with the importation of merchandise and the assessment of duties thereon.

What the Federal Circuit failed to acknowledge, however, was that Section 1505 contains an express Congressional waiver of sovereign immunity requiring the payment of interest on refunds of *all* Customs duties. To the extent that the Federal Circuit declined to award petitioner interest on its HMT refund, its decision ignores the express command of the governing statute, the WRDA, that the HMT be treated, for administration and enforcement purposes "as if such tax were a customs duty."

The breadth of Congress' waiver of sovereign immunity is best understood by briefly examining the procedures by which Customs duties are collected.

Because the Export Clause of the Constitution

prohibits the levying of a tax on exports, the term "Customs duties" is understood in United States law to connote the imposition of a tax on imported merchandise. *United States Shoe Corp. v. United States*, 523 U.S. 360, 367 (1998). Customs duties are deposited on imported merchandise at the time the importer of record files an "entry." 19 U.S.C. § 1484.[3] Customs is required to "liquidate"[4] the entry, determining the rate and amount of duty chargeable on goods covered by the entry, and also determining "any increased or additional duties, taxes and fees due or any excess of duties, taxes and fees deposited." 19 U.S.C. § 1500(d).[5] Because all Customs duties are collected using the "entry" and "liquidation" procedures of the Tariff Act, it follows that 19 U.S.C. § 1505 requires the payment of interest on *all* refunds of customs duties.

By failing to construe the Tariff Act and 26 U.S.C. § 4462(f)(1) *in pari materia*, the Federal Circuit disregarded the governing legislation and failed to effectuate Congressional intent. Customs duties are refunded with interest, pursuant to 19 U.S.C. §1505, which is admittedly an "administrative and

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[3] An "entry" consists of certain documents, required to be filed with the appropriate Customs officer, to secure the release of imported merchandise from Customs custody. 19 C.F.R. § 142.3. "Entry" is also used to connote the act of filing that documentation.

[4] "Liquidation" is defined at "the final computation or ascertainment of the duties * * * accruing on an entry. 19 C.F.R. § 159.1.

[5] Customs may also "reliquidate" the entry, either voluntarily, or following the allowance of a protest or the issuance of a judgment by the United States Court of International Trade. *See* 19 U.S.C. §§ 1501, 1503.

enforcement provision" of the Customs laws. Congress has provided that the administrative and enforcement provisions, including §1505, must be applied to the HMT "as if such tax were a customs duty." 26 U.S.C. § 4462(f)(1). *Yet under the Federal Circuit's decision, the export HMT is* ***not*** *treated as a customs duty.* The waiver of sovereign immunity contained in 19 U.S.C. § 1505, and the extension of that waiver contained in 26 U.S.C. § 4462(f)(1) are both disregarded.

Such an erroneous construction not only disregards the plain language of the statutes, but ignores the longstanding canon of statutory construction that, where two statutes are related, they must be construed *in pari materia*. *See* 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, Section 51.07 at p. 267 (6th ed. 2000)(special class of related statutes created where one statute adopts the terms of the other without restating them). *See also Beals v. Hale*, 45 U.S. 37, 53(1946); *See Lorillard v. Pons*, 434 U.S. 575, 578 (1978).

The Federal Circuit in this case relied upon its decision in *IBM*, which held that 19 U.S.C. § 1505(c) did not apply to export HMT refunds, since it "contemplates an entirely different factual scenario from the one before us," one in which the terms "importer of record," "liquidation" and "entry" are used Pet. App. 128a. This "scenario," however, is merely the legal administrative and enforcement procedure for the collection, ascertainment and refund of *customs duties* – precisely the scenario which Congress, in 26 U.S.C. § 4462(f)(1), adopted for the HMT.

The WRDA did not specify procedures for the determination, collection, adjustment, or refund of the HMT. Rather, Congress left the selection of procedures to the Customs Service, subject of course to the statutory command

that the HMT be treated, for administrative and enforcement purposes, "as if such tax were a customs duty." By regulation, Customs has decided that, for reasons of administrative convenience, certain HMTs (those collected on shipments unloaded at United States ports and not deposited in Foreign Trade Zones) will be collected using the "entry" and "liquidation" procedures utilized for customs duties,[6] while some HMTs (e.g., those on exports, Foreign Trade Zone deposits, and inland waterway movements) will be collected by means of a quarterly returns.[7] Where Customs collects HMTs using the entry procedure, the agency pays interest on refunds of the tax under authority of 19 U.S.C. § 1505[8]. By virtue of the Federal Circuit's decision in this case, however, all other HMT refunds are paid without interest.

Nothing in the WRDA or its legislative history suggests that Congress intended to apply the interest provisions of the Customs laws to some HMTs, but not to others. Moreover, nothing in the law or its legislative history suggests that Congress delegated to Customs the power to determine whether, and to what extent, the Congressional

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[6] *See* 19 C.F.R. § 24.24(e)(2)(ii) (2001) ("The port fee use on unloading imported cargo shall be paid in accordance with the normal customs collection procedures set forth in §§ 24.1 and 141.1 of this chapter, except as provided for merchandise admitted into foreign trade zones in paragraph (e)(2)(iii) of this chapter.")

[7] *See* 19 C.F.R.. § 24.24(e)(1)(ii) (2001) (domestic vessel movements), § 24.24(e)(2)(iii)(2001) (import vessel merchandise deposited in Foreign Trade Zones), §24.24(e)(3) (2001) (passenger carriage).

[8] *See, e.g., Customs Headquarters Ruling 227649 of October 3, 1997.*

waiver of sovereign immunity with respect to interest should apply to the HMT. Under the circuit court's analysis, the existence of a waiver of sovereign immunity is determined solely by Customs' regulatory choice of a collection mechanism.

That Congress elected not to use the terms "entry" or "liquidation" in providing for the collection of certain HMTs is of no moment. The WRDA created a "legal fiction,"[9] requiring that the HMT be administered "as if" it were a Customs duty. Even if Customs elected not to use the term "entry" to describe the documentary submission required of certain HMT taxpayers, nor the term "liquidation" to describe the final determination of the tax owed, 26 U.S.C. §4462(f)(1) requires the HMT to be treated "as if" the taxes were Customs duties to which these administrative and enforcement procedures had been applied.

Where Congress extends one law to cover another, as it did here, the statutes are *in pari materia* and must be read together so that both are given full effect. In this case, the Federal Circuit interpreted the WRDA and the Tariff Act in a way which nullifies Congress' extension of the Customs

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[9] The creation of a "legal fiction" was necessary and purposeful. Congress understood that the HMT was not a customs duty, but rather a tax, codified in the Internal Revenue Code. Customs likewise recognized that the tax did not merely fall upon imports, but also on domestic and export movements of merchandise, and on the provision of *services,* such as passenger carriage. Rather than specifying different collection and determination procedures for each taxable circumstance, the WRDA simply adopted the Customs laws by extension, requiring that the HMT in all its forms be treated "as if" it were a Customs duty.

laws to some HMTs. Such a construction violates the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dep't of Revenue of Oregon v. AFC Industries, Inc.*, 510 U.S. 332 at 340 (1994), citing *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 427 U.S. 237, 249 (1985).

The Federal Circuit's error is all the more glaring given that, years after the WRDA was enacted, Congress expanded the 19 U.S.C. § 1505(c) waiver of sovereign immunity regarding the payment of interest on Customs duty refunds. Former 19 U.S.C. § 1520(d) limited the payment of interest to amounts paid as "increased or additional duties under section 1505(c) of this title" – that is, duties assessed at the time of liquidation of the entry. This resulted in the payment of interest on some duty refunds, but not others. *See Kalan, Inc. v. United States*, 944 F.2d 847 (Fed. Cir. 1991), *cert. denied*, 503 U.S. 906 (1992).[10]

Congress corrected this anomaly in Section 642 of the

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[10] The former provisions on interest created an anomaly. For example, assume that two importers entered the same product, and each was assessed $100 in customs duties. However, Company A paid the full $100 at the time of entry, while Company B paid $60 at the time of entry and was assessed an additional $40 upon liquidation. If both importers protested the assessments, and ultimately secured determinations that the products were duty free, Company B would receive its refund with interest, but interest would be paid only on the $40 assessed as "increased or additional duties" upon liquidation. Company A would receive its refund without interest, because its duties were all paid at the time of entry and no "increased or additional duties" were imposed at liquidation. Thus, even though Customs wrongly held its funds for a longer time, Company A received no interest whatsoever, a result upheld by the Federal Circuit's *Kalan* decision.

North American Free Trade Implementation Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057, which amended 19 U.S.C. § 1505(c) to require the payment of interest on *all* refunds of excess customs duties. The Congressional purpose was "to provide equity in the collection and refund of duties and taxes, together with interest, by treating collections and refunds equally." *See* H.Rep. 103-361(I), 103rd Cong., 1st Sess., *reprinted at* 1993 U.S.C.C.A.N. 2552, 2690.

In thus amending 19 U.S.C. §1505(c) to expand the waiver of sovereign immunity with respect to the payment of interest on duty refunds, Congress is presumed to have been aware of its earlier enactment of the WRDA, and its extension of the administrative and enforcement provisions of the Customs laws to the HMT. *See, e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Further, where Congress adopts a statute by reference, it is presumed to adopt all subsequent modifications and amendments of the referenced statute, and to have intended that both statutes remain fully effective. *See* 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.08 (6th ed. 2000), and *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Congress has waived statutory immunity against the payment of interest on refunds of taxes (28 U.S.C. §2411) and customs duties (19 U.S.C. §1505). Yet the Federal Circuit has ruled (in *IBM*) that the HMT may not be treated as a "tax" for purposes of 28 U.S.C. §2411 precisely because it must be treated "as if it were a customs duty." But confronted with the statute requiring the payment of interest on customs duties, 19 U.S.C. §1505, the Federal Circuit has ruled that it will not treat the HMT as a customs duty because it is collected in the manner of a tax. Far from reconciling statutes *in pari materia*, these self-contradictory decisions establish a "Catch-22" paradox, leaving the export HMT as virtually the

only Federal tax which is refunded without interest.

It is unreasonable to assume that Congress intended to waive sovereign immunity to require the payment of interest on refunds of taxes which are authorized by the Constitution, but to deny interest on refunds of a tax held to be unconstitutional. Because the Federal Circuit's decision ignores governing law and yields an unreasonable outcome, the writ of certiorari should issue.

B. The Export Clause of the Constitution Requires the Payment of Interest

The Export Clause of the Constitution provides a cause of action with a monetary remedy that requires the refund of unconstitutionally imposed taxes. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). Because the Export Clause *absolutely* prohibits the imposition of any Federal pecuniary burden on exports, this Court has ruled that its "restriction should be enforced in accordance with its *letter and spirit*." *United States v. Hvoslef*, 237 U.S. 1, 15 (1915) (emphasis added). By holding that the export HMT could be refunded without payment of interest, the Federal Circuit disregarded the spirit of the clause and countenanced the placing of a Federal pecuniary burden on exports. Because the Federal Circuit did not enforce the Export Clause according to this Court's direction in *Hvoslef* and other cases, its denial of interest is erroneous and a writ of *certiorari* should issue to allow review of the decision.

The Export Clause prohibition on the taxation of exports is absolute. *Pace v. Burgess*, 92 U.S. 372 (1875). It requires that "exportation, all exportation, shall be free from national burden." *United States v. Hvoslef*, 237 U.S. at 15,

citing Fairbank v. United States, 181 U.S. 283, 290 (1901). This Court recently noted that there is "substantial evidence from the Debates that the proponents of the Clause fully intended the breadth of scope that is evident in the language." *United States v. International Business Machines Corp.*, 517 U.S. 843, 859-860 (1996).

Monetary remedies for Export Clause violations must be fashioned to completely eliminate national burdens on exports, and carry out the Framers' intent. The remedy for an Export Clause violation is not specified in the Constitution's text, but has been discerned by this Court to be a monetary one, which must leave exports completely unburdened. In *Hvoslef*, 237 U.S. 1, 15 (1915), this Court noted that "no legislation can be tolerated which, although it may not conflict with the letter, destroys that spirit and purpose of the restriction imposed . . . ." Remedial measures fashioned by the courts must ensure that "exportation, all exportation, shall be free from national burden." *Id.*, citing *Fairbank*, 181 U.S. at 290.

In this case, the Federal Circuit has ruled that the governing statutes, 26 U.S.C. § 4462(f)(1) and 19 U.S.C. § 1505, should be interpreted in a way which countenances the imposition of a Federal burden on exports, by allowing the Federal government to exact a percentage of the value of exported merchandise, retain that money for a long period, and then (under judicial compulsion) refund the unconstitutionally-exacted money without paying interest. This is as much a burden on exports as if Congress had passed a law compelling exporters to make a long-term, interest free loan to the government. That the taxation – the deprivation of funds — is temporary, rather than permanent, does not alter the fact that a pecuniary burden has been imposed on exported goods. Even assuming the governing statutes did

not explicitly provide the waiver of sovereign immunity needed to support an award of interest, the Export Clause of the Constitution must be read to require that interest be paid.

This Court has long acknowledged the unique nature of the Export Clause. "[I]t is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports." *Fairbank v. United States*, 181 U.S. 283, 292 (1901). A view of the HMT statute which allows the government to benefit from the taxation of exports violates not merely the letter of the Export Clause, but also its spirit.

A refund of HMT principal, without interest, does not completely undo the harm which the Export Clause seeks to prevent, i.e., subjecting exported goods to "national burden."

Under the Federal Circuit's decision, the Federal government might enact a tax on exported merchandise, knowing that it would ultimately be compelled to repay the taxes collected,[11] but would in the interim have cost-free use of the funds. The government might invest the monies to produce additional interest revenue (as, indeed, the Harbor Maintenance Trust Fund has accumulated significant interest

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[11] The tax monies would be retained until the taxing statute were declared unconstitutional. In this regard, it is noteworthy that both the Anti-Injunction Act, 26 U.S.C. § 7421(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201, prohibit the issuance of relief enjoining the collection of a tax. Thus, exporters could not enjoin the Federal Government from imposing an unconstitutional export tax, but could only pay the tax and sue for its return.

income), or expend the funds for public purposes which might otherwise have to be financed through constitutionally permitted taxation or borrowing. Compelling interest-free loans from exporters of commercial cargo is as much a prohibited burden on exports as collection of an *ad valorem* tax in the first place. If such a result is countenanced, then the burdening of exports through taxation has not been prohibited, as the Export Clause requires, but merely *limited*. In such a circumstance "the Export Clause would be more hollow than real because in the event that Congress imposed export taxes, equitable relief alone could not ameliorate the harm." *Cyprus Amax Coal Co. v. United States,* 205 F.3d 1369, 1373-74 (Fed. Cir. 2000), *cert. denied,* 532 U.S. 1065 (2001).

In this regard, *amici* note that the "general rule" of *Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986), is that "*Apart from constitutional requirements* . . . interest does not run on a claim against the United States." (Emphasis added.) Thus, before resorting to the "general rule" of *Shaw*, as the Federal Circuit did, it is necessary to determine whether a constitutional requirement to pay interest exists under the Export Clause itself. The Federal Circuit did not make such an inquiry, but merely reasoned that since only the Takings Clause of the Fifth Amendment to the Constitution contains an *explicit* restorative clause, requiring the payment of "just compensation" for governmental takings, the Export Clause could not be construed to require the payment of interest.

Such an analysis is hardly persuasive. The Takings Clause anticipates that the government will lawfully exercise its takings power, and prescribes the compensation to be provided for such lawful action. By contrast, the Export Clause denies the government absolutely the power to tax exports. The Framers, having denied the government the

power to tax exports, could hardly have been expected to anticipate that the government would disregard this command, and thus provide a restorative clause. Indeed, if the Export Clause contained a restorative provision, the Clause would not prohibit the taxation of exports, but merely condition it. The Export Clause does not explicitly prescribe the return of unconstitutionally-taken taxes, yet this Court has discerned such a remedy in the clause.

This Court has not previously been called upon to determine whether the Export Clause itself requires the payment of interest on amounts unconstitutionally taxed. This is presumably because previous taxes struck down under the clause have been repaid with interest as required by statute. As noted above, *amici* submit that there is a statutory basis for the award of interest on refunds of the export HMTs. If the Court holds that interest is not provided by statute, however, then the question of whether the Export Clause itself requires the payment of interest is an original issue of Constitutional interpretation which by itself would justify granting the writ of *certiorari*.

C. The Commercial and Financial Importance of the Case Supports Granting of the Writ

Finally, the commercial and financial importance of the issues presented in this case support granting the writ of *certiorari*.

During the years the unconstitutional export HMT was in force, taxes of more than $1.4 billion were collected on exports. More than 3000 lawsuits were filed and remain pending in the United States Court of International Trade, seeking refunds of unconstitutional export HMT refunds. To date, the CIT has issued judgments awarding more than $750

million in refunds of export HMT principal to the exporter-plaintiffs in these lawsuits, while staying the award of interest. This Court's determination concerning whether interest is payable on refunds of the export HMT will permit the resolution of these thousands of lawsuits.

Furthermore, the Customs Service is currently processing more than 7,500 additional administrative applications for refunds of the unconstitutional export HMT. At present, Customs is refunding tax principal amounts, without interest, and exporters have filed protests challenging the agency's failure to provide interest on these refunds. This Court's determination regarding whether interest is payable on export HMT refunds will permit the orderly resolution of these thousands of additional refund claims.

Given the considerable financial interests at stake, and the large number of potentially affected parties, the commercial and financial importance of the issues presented by Petitioner support the issuance of a writ of *certiorari*.

CONCLUSION

The petition for a writ of *certiorari* presents important questions of statutory construction and Constitutional law. Resolution of these issues will affect significant commercial interests and aid in the disposition of thousands of pending lawsuits and administrative tax refund claims. Given these factors, and the substantial merit of the arguments set forth in the petition, the writ of *certiorari* should issue.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

UNITED STATES SHOE CORP., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37(a)(3), upon written consent of all parties, *amicus curiae* the Customs and International Trade Bar Association ("CITBA") respectfully submits this brief *amicus curiae* in support of Petitioner United States Shoe Corp., and urges that the petition for a writ of *certiorari* be granted.

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, CITBA, founded in 1926, is a voluntary association of attorneys who maintain an interest in the field of customs law, international trade law and related matters. CITBA members represent United States importers, exporters and others concerned with matters that involve the United States customs and international trade laws. CITBA's members regularly represent clients before the United States Court of International Trade ("CIT") and the United States Court of Appeals for the Federal Circuit ("CAFC") in Customs and trade matters, and the Association's members act as counsel for thousands of exporters who have brought suit challenging the Harbor Maintenance Tax ("HMT") on exports, which this Court held unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998).

CITBA regularly submits briefs *amicus curiae* in this

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1. Counsel for the parties have consented to the filing of this *amicus brief*, and the letters of consent are being filed with the Court under separate cover. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Court[2] and others in cases involving significant issues arising under the international trade and Customs laws of the United States. This case is particularly significant, since it presents the important question of whether exporters who were compelled to pay hundreds of millions of dollars in unconstitutionally-exacted HMTs are entitled to receive interest on refunds of those taxes.

Because Congress expressly provided in the *Water Resources Development Act*, 26 U.S.C. § 4462(f)(1)("WRDA"), that the HMT is to be treated, for administration and enforcement purposes, "as if such tax were a customs duty," and because Section 505 of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1505), requires the payment of interest on refunds of all excess customs duties collected, it is clear that Congress has waived the government's sovereign immunity and directed that interest be paid on all HMT refunds. Because the Federal Circuit failed to read these two governing statutes *in pari materia*, its decision below denying interest on refunds of the export HMT is erroneous. The court of appeals' decision frustrates not only specific Congressional intent, but also the explicit command of the Framers of the U.S. Constitution that no burden of any kind be placed on exports. *See Fairbank v. United States*, 181 U.S. 283 (1901); *United States v. Hvoslef*, 237 U.S. 1 (1915).

Because the petition for *certiorari* in this case raises significant legal and Constitutional issues for review by this Court, the writ should be granted.

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2. *See*, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 224 n.4 and 233 (2001).

SUMMARY OF ARGUMENT

The Federal Circuit's ruling that interest need not be paid on refunds of the unconstitutionally-exacted Harbor Maintenance Tax on exports ignores Congress' explicit waiver of statutory immunity with respect to such refunds. Section 505(b) of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1505(b)) expressly waives sovereign immunity by providing that interest shall accrue on all customs duties collected by the U.S. Customs Service. The WRDA, 26 U.S.C. § 4462(f)(1), requires that "all administrative and enforcement provisions of [the] customs laws and regulations shall apply in respect of the [HMT] *as if such tax were a customs duty*" (emphasis added). Because provisions of law governing the payment of tax refunds and interest thereon unquestionably relate to the "administration and enforcement" of such taxes,[3] it follows that Congress directed that refunds of the HMT – like refunds of customs duties – be paid with interest.

The circuit court erred by failing to read the provisions of the Tariff Act and the WRDA *in pari materia*. By failing to apply this essential canon of statutory construction, the circuit court concluded erroneously that 19 U.S.C. § 1505, while unquestionably a law governing "administration and enforcement" of the Customs laws, did not apply to the export

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3. *See*, e.g., *Int'l Business Machines Corp. v. United States*, 201 F.3d 1367 (Fed Cir. 2000), *cert. den.*, 531 U.S. 1183 (2002)(28 U.S.C. § 2411, providing for the payment of interest on judgments awarding refunds of excess taxes, held inapplicable to the export HMT based on a provision in the *Water Resources Development Act*, 26 U.S.C. § 4462(f)(3) directing that the HMT "shall not be treated as a tax" for purposes of laws "relating to the *administration and enforcement* of internal revenue taxes")(emphasis added).

HMT. This interpretation fails to give effect to the Congressional intent manifested in the WRDA.

Significantly, in 1993 Congress expanded the waiver of sovereign immunity contained in 19 U.S.C. § 1505, to make explicit that interest must be paid on *all* refunds of customs duties. Congress must be presumed to have made this amendment with full knowledge that, seven years earlier, in the WRDA, it had directed that the HMT be treated as a customs duty.

Finally, the Federal Circuit erred in holding that 19 U.S.C. § 1505 did not authorize an award of interest to petitioners because that statute speaks of the "liquidation or reliquidation of the applicable entry or reconciliation" – acts which the Customs Service has elected not to perform with respect to the export HMT. *All* "customs duties" are deposited with entries or reconciliations, which then undergo "liquidation or reliquidation." Section 1505(b), therefore, compels the payment of interest on *all* refunds of excess customs duties, not merely on a class or subset of excess duties. By refusing to award interest to petitioners, the circuit court ignored the Congressional command in the WRDA that the HMT be treated "as if such tax were a customs duty." The WRDA's use of the phrase "as if" creates the legal fiction that the HMT is a customs duty. It is therefore irrelevant that Customs has elected not to use the terms "entry," "reconciliation," "liquidation" or "reliquidation" in providing for the collection, determination and refund of the export HMT.

STATEMENT

Amicus curiae the Customs and International Trade Bar Association ("CITBA") respectfully files this brief on

consent of all parties in support of petitioner United States Shoe Corp., urging that this Court grant the request for issuance of a writ of *certiorari* to the Court of Appeals for the Federal Circuit.

Amicus curiae concurs with the Statement of the Case set forth in petition for *certiorari*.

REASONS FOR GRANTING THE WRIT

A. The Water Resources Development Act, 26 U.S.C. § 4462(f)(1), Expressly Waives the Government's Sovereign Immunity from an Award of Interest By Making the Customs Interest Statute, 19 U.S.C. § 1505, Applicable to the HMT

While interest may be recovered in a suit against the government only if there has been a clear and express waiver of sovereign immunity, *Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986), the Federal Circuit erred in holding that 19 U.S.C. § 1505, which authorizes an award of interest, "does not apply to exports because it speaks only to imports." Pet. App. at 6a. While Section 1505 uses nomenclature which describes the collection and determination of customs duties on imports, the WRDA clearly commands that for purposes of the HMT, "**all administrative and enforcement provisions of [the] Customs laws and regulations shall apply in respect of the tax** . . . (and in respect of persons liable therefor) **as if such tax were a customs duty**." 26 U.S.C. § 4462(f)(1). (emphasis added).

Because the customs laws, specifically 19 U.S.C.

§1505 (b)[4] and (c),[5] provide for the payment of interest on *all* refunds of excess duties, it is clear that the WRDA and the Tariff Act, when read *in pari materia*, constitute an express waiver of sovereign immunity with respect to the payment of interest on refunds of the HMT. The circuit court erred in holding otherwise.

In holding that Section 1505 did not apply to the HMT on exports, the Federal Circuit, relying on its decision in *International Business Machines Corp. v. United States*, 201 F.3d 1367, 1371 (Fed. Cir. 2000)("*IBM*"), determined that,

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4. Section 505(b) of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1505(b)) provides that:

> The Customs Service shall collect any increased or additional fees due, together with interest thereon, or **refund any excess monies deposited, together with interest thereon**, as determined on a liquidation or reliquidation. Duties, fees and interest determined to be due on liquidation or reliquidation are due 30 days after the issuance of the bill for such payment. Refunds of excess moneys deposited, **together with interest thereon**, shall be paid within 30 days of liquidation or reliquidation. (Emphasis added).

5. Section 505(c) of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1505(c)), provides that:

> Interest assessed due to an underpayment of duties, fees or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits such estimated duties, fees and interest . . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation.

because Section 1505 contains references to terms such as "entry," "liquidation" and "reliquidation," it "does not apply to exports because it speaks only of imports" Pet. App. 6a. As in *IBM,* the court of appeals "declined to rewrite" the statute to make it applicable to the export HMT.[6] No rewriting of Section 1505 is necessary, however, for Congress, in 26 U.S.C. § 4462(f)(1), adopted the administrative and enforcement provisions of customs laws, including Section 1505, and directed that they be applied to the HMT "as if" the HMT were a Customs duty. Congress' extension of the customs laws was not limited to the HMT on imports alone, but encompassed the HMT as a whole.

By failing to construe the Tariff Act and 26 U.S.C. § 4462(f)(1) *in pari materia,* the circuit court disregarded the statutory commands and failed to effectuate Congressional intent[7]. Clearly, 26 U.S.C. § 4462(f)(1) adopts all of the

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6. In *IBM,* the Federal Circuit did concede that "the interest provisions of the customs laws [viz. § 1505] * * * apply to the HMT." 201 F.3d 1367, 1374 (Fed. Cir. 2000).

7. Congress' intent is manifest from the legislative history to the WRDA. The Senate Report accompanying the Act noted that:

> There are currently no Federal fees or charges assessed on port use in the United States. There is, however, a substantial body of law relating to the importation of merchandise and the collection of Customs duties. The Tariff Act of 1930, as amended (codified in volume 19 of the U.S. Code) and the Customs Regulations (volume 19 of the Code of Federal Regulations) set out detailed rules and procedures for the classification and appraisal of imported merchandise and for the administration and enforcement of the customs laws.
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> * * *

provisions of 19 U.S.C. Title 19, without restating them, for use in the administration and enforcement of the HMT. Where two statutes are thus related, they must be construed *in pari materia*. *See* 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, §51.07 at p. 267 (6th ed. 2000)(A special class of related statutes is created where one statute adopts the terms of the other statute without restating them. Thus, a statute may refer to another and incorporate part or all by reference). *See also Beals v. Hale*, 45 U.S. 37 (1946)(It is an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law.).

This Court has recognized that, where Congress intends to incorporate an enforcement scheme set out in an existing statute, it can do so through adoption by reference. *See Lorillard v. Pons*, 434 U.S. 575, 578 (1978). A statute which refers to a subject generally adopts the law on the subject, including all amendments and modifications of the law subsequent to the enactment of the reference statute. 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, §51.08, at p. 275 (6th ed. 2000).

By declining to apply 19 U.S.C. § 1505 to the export HMT, the court of appeals frustrated Congress' clear intent that the HMT be treated "as if it were a Customs duty."

> In order to facilitate the administration and enforcement of the port user charges by the U.S. Customs Service, the committee amendment provides that all administrative and enforcement provisions of U.S. customs statutes and treasury regulations thereunder are to apply with respect to the port user charges imposed by the committee amendment *as if such charges were customs duties*. [Emphasis added].

Rep. 99-228, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 6639, at 6714-6715.

Refunds of excess Customs duties are paid with interest pursuant to Section 1505; refunds of excess HMTs assessed on exports are not.

It is also important to note that 19 U.S.C. § 1505 does not provide for payment of interest on refunds of *some* customs duties, but on refunds of *all* customs duties. As this court has noted, the Constitution limits the imposition of customs duties to imports. *United States Shoe Corp. v. United States*, 523 U.S. 360, 366 (1998). Customs duties are deposited on imported merchandise at the time the importer of record files an "entry." 19 U.S.C. § 1484. By law, Customs is required to "liquidate" the entry, determining the rate and amount of duty chargeable on goods covered by the entry, and also determining "any increased or additional duties, taxes and fees due or any excess of duties, taxes and fees deposited." 19 U.S.C. § 1500(d). Customs may also "reliquidate" the entry, either voluntarily, or following the allowance of a protest or the issuance of a judgment by the United States Court of International Trade. *See* 19 U.S.C. §§ 1501, 1503.

Section 505(b) of the Tariff Act, 19 U.S.C. § 1505(b), requires the Customs Service to, *inter alia*, "refund any excess moneys deposited, *together with interest thereon*, as determined on a liquidation or reliquidation" (emphasis added). Customs' regulation providing for refunds of excess HMTs, 19 C.F.R. § 24.24(e)(4)(2000 and 2001), was adopted under authority of 19 U.S.C. § 1505,[8] and, indeed, the repayment of HMT principal to exporters was and is made under authority of Section 1505.

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8. *See* 67 Fed. Reg. 31,948 (May 13, 2002); 66 Fed. Reg. 16,854 (March 28, 2001); 66 Fed. Reg. 21,086 (April 27, 2001); 66 Fed. Reg. 34,813 (July 2, 2001).

Since 19 U.S.C. § 1505 is unquestionably an "administrative and enforcement" provision of the customs law – it is codified in Chapter 4 of Title 19, which sets out the "administrative provisions" of the customs laws – the court of appeals' failure to apply the interest provisions of that law to refunds of the HMT is inexplicable.

In *IBM*, the Federal Circuit suggested that Section 1505(c) did not apply to export HMT refunds, since it "contemplates an entirely different factual scenario from the one before us," a scenario in which the terms "importer of record," "liquidation" and "entry" are used. Pet. App. 128a. The court below adopted this view. Pet. App. 6a. As the foregoing analysis shows, however, these terms of statutory art do not describe some alien landscape, but rather the procedures for the collection and administration of customs duties – *the very procedures which Congress, in 26 U.S.C. § 4462(f), extended and made applicable to the HMT.*

Thus, in directing that interest on refunds of Customs duties be paid from the date the importer or taxpayer "deposits estimated duties fees or interest . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation," 19 U.S.C. § 1505(c) merely defines the time period for which interest is payable – from the date the excess duties or taxes are deposited until the date the duties or taxes are refunded (through liquidation or reliquidation of the entry).

That Customs may have elected not to use the term "entry" to describe the process for depositing the export HMT, nor the term "liquidation" to describe its final determination of the amount of HMT owed, does not preclude the application of 19 U.S.C. § 1505 to the tax. The legislative history of 26 U.S.C. § 4462(f), the explicit requirement that the HMT be treated "as if it were a customs duty" and

Congress' extension to the HMT of customs laws which do not mention the tax by name, all support the overriding principle that the customs laws must be interpreted to include the HMT within their administrative and procedural coverage.[9] Cf. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1983)("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent").

In this case, the Federal Circuit acknowledged the Congressional direction that the HMT be treated, for administration and enforcement purposes, "as if such tax were a customs duty," and then shrank from its duty to apply 19 U.S.C. § 1505 to HMT refunds precisely because that statute employed the nomenclature used in the administration of customs duties. This yields a self-contradictory determination which not only ignores Congress' express waiver of sovereign immunity, but also frustrates clear Congressional intent that such waiver extend to the HMT.

Canons of statutory construction require that 26 U.S.C. § 4462(f) be interpreted properly to extend the

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9. That Congress in 26 U.S.C. § 4462(f)(1) directed Customs to treat the HMT "as if" it were a Customs duty indicates that Congress was quite aware that the HMT was not, in fact, a duty. The use of the phrase "as if" was intended to create the legal fiction that the HMT was to be treated as though it underwent all procedures attendant to the administration and enforcement of Customs duties – collection, determination and refund, to name a few. Accordingly, it is irrelevant whether the HMT in a particular case is the subject of an "entry" or "liquidation," or is paid by an "importer of record." Congress clearly intended that the HMT be treated *as if* these procedures had been applied. "As if" means "in the same manner and to the same extent." *New England Commercial Bank v. Stockholders of Newport Steam Factory*, 6 R.I. 154, 187 (1859).

administrative provisions of the Customs law to the HMT in all its iterations (imports, exports, inland waterway movements, foreign trade zone admissions, passenger fees). To hold otherwise, as the court of appeals did, in this case and *IBM* as well, "would contravene the 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dep't of Revenue of Oregon v. AFC Industries, Inc. et al.*, 510 U.S. 332 at 340 (1994), citing *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). The Federal Circuit's interpretation applies 19 U.S.C. § 1505(c)'s interest provisions to HMTs assessed on import vessel movements[10] – which Customs has by regulation (19 C.F.R. § 24.24(e)(2) (2001)) chosen to collect by requiring the filing of import entries and to refund pursuant to "liquidations" or "reliquidations" – but denies application of the interest provisions to HMTs which Customs has chosen to collect through other procedures. Nothing in 26 U.S.C. § 4462(f) suggests that Congress intended that the customs laws be

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10. It should be noted that not every HMT assessed with respect to "import vessel movements" is assessed on "imported" merchandise which is otherwise subject to the assessment of Customs duties. Indeed, 26 U.S.C. § 4462(a)(1)(B) defines taxable "port use" to include "the unloading of commercial cargo from, a commercial vessel at a port." The tax falls not only on "imports," but also on goods shipped from one United States port to another. This might occur if, for example, a United States-flag vessel discharged at a port both imported merchandise and goods carried in coastwise trade. The courts have held that the HMT is not eligible for duty drawback under 19 U.S.C. § 1313(j), because it is not a tax assessed upon merchandise "because of . . . its importation." *See*, e.g., *George E. Warren Corp. v. United States*, 201 F. Supp. 2d 1366, 1371 (Ct. Int'l Trade 2002), *appeal docketed*, No. 02-1467 (the HMT "is intended to be assessed independently of whether the 'port use" is for imports, exports or other shipments; a shipment unloaded in Savannah is charged the same HMT regardless of whether its origin is San Francisco or Singapore"); *see also Texport Oil Co. v. United States*, 185 F.3d 1291 (Fed. Cir. 1999).

extended to certain HMTs, but not to others. Moreover, it would be entirely implausible to suggest that Customs could frustrate Congress' intent to treat the HMT "as if" it were a Customs duty by simply electing an unusual method of collecting the tax.[11]

The terms of a statute cannot be read in a vacuum. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)("[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme", citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 at 809 (1989). "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" *Id.*, citing *Gustafson v. Alloyd Co.*, 513 U.S. 561 at 569 (1995) and *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385 at 389 (1959).

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11. If, as the court of appeals ruled, the government's duty to pay (or not pay) interest on refunds of excess HMT turns solely on the method which Customs chooses for collecting the tax, then it follows that Customs might electively stop collecting the HMT on imported merchandise by means of the "entry" and "liquidation" procedures, and collect the tax using the same quarterly return procedure employed for the export HMT. This would eliminate the government's existing obligation to pay interest on refunds of import HMT. However, there is nothing in either the WRDA or the Tariff Act to suggest that Congress delegated to Customs the power to define the scope of the waiver of sovereign immunity. Indeed, since 26 U.S.C. § 4462(f)(1) directs Customs to treat the HMT "as if it were a Customs duty," and since all Customs duties are collected through the "entry" and "liquidation" procedures of 19 U.S.C. §§ 1484 and 1500, the better view is that Congress intended that all HMTs be collected using these procedures, or administered as though they were.

B. Following Enactment of the WRDA, Congress Expanded the Waiver of Sovereign Immunity Requiring Payment of Interest on Refunds of Customs Duties

It is also noteworthy that, several years after enacting 26 U.S.C. § 4462, and extending the administration and enforcement provisions of the Customs laws to the HMT, Congress expanded the waiver of sovereign immunity contained in 19 U.S.C. § 1505. In taking this action, Congress must be presumed to have been aware of its earlier legislation extending provisions of the Customs law to the HMT.

Prior to 1993, the availability of interest on refunds of excess customs duties was limited. Former section 520(d) of the Tariff Act of 1930, *as amended,* (19 U.S.C. § 1520(d)) provided that where duties were refunded as the result of a protest or petition for reliquidation, interest was to be allowed "on any amount paid as increased or additional duties under section 1505(c) of this title . . . ." This resulted in an anomalous situation. If an importer deposited excess duties at the time of entry, and subsequently received a refund, no interest was payable. However, if another importer, facing the same legal issue, tendered the excess duties as "additional duties" at the time an entry liquidated, it received interest on those sums when the excess duty was refunded. Ironically, the party whose excess duties had been on deposit with Customs for the longer period received no interest. Absent a waiver of sovereign immunity, however, the courts ruled that there was no basis for awarding interest on duty refunds other than as expressly provided in the statute. *Kalan, Inc. v. United States*, 944 F.2d 847, 850-52 (Fed. Cir. 1991), *cert. denied*, 503 U.S. 906 (1992).

Congress addressed the anomaly in Section 642 of the

North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057, which amended 19 U.S.C. § 1505(c) to require the payment of interest on *all* refunds of excess customs duties. Section 642 also amended the statute to require importers to pay interest to the government on all underpayments of Customs duties. The Congressional purpose, as set out in the legislative history, was to "provide equity in the collection and refund of duties and taxes, together with interest, by treating collections and refunds equally." *See* H. Rep. 103-361(I), 103rd Cong., 1st Sess., *reprinted at* 19 U.S.C.C.A.N 2552, 2690.

In amending 19 U.S.C. § 1505(c) to expand the waiver of sovereign immunity with respect to the payment of interest on duty refunds, Congress is presumed to have been aware of its earlier enactment of the WRDA, and its extension of the administrative and enforcement provisions of the Customs laws to the HMT. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)(Congress presumed to have been aware of prior legislation addressing same or related subject matter). Moreover, as noted above, where Congress adopts a statute by reference, it is it is presumed to adopt all subsequent amendments and modifications of the referenced statute. 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 51.08 (6th ed. 2000). It must also be assumed that Congress intended both statutes to remain fully effective. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).[12]

Thus, when Congress amended 19 U.S.C. § 1505 to expand the waiver of sovereign immunity relative to Customs duties, it must be presumed that Congress was fully aware

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12. The Customs Service has certainly applied the expanded "interest" provisions of 19 U.S.C. § 1505 to HMTs which are paid in connection with import entries. *See*, e.g., *Customs Headquarters Ruling 227649 of October 3, 1997.*

that it was also expanding the waiver of immunity with respect to refunds of HMTs, and intended that result. By the same measure, the amendment of 19 U.S.C. § 1505 must also be assumed to require taxpayers to pay interest to Customs where HMTs are underpaid.

Congress, in expanding the waiver of sovereign immunity for payment of interest on refunds of excess customs duties, must be presumed to have been aware of its earlier enactment of 26 U.S.C. § 4462(f)(1), and to have intended that the waiver of sovereign immunity apply with equal force to the HMT, "as if such tax were a customs duty." The court of appeals erred in holding otherwise.

C. Certiorari Should Be Granted in Light of the Commercial Importance of the Issue Presented

CITBA's members collectively represent thousands of exporters who were unlawfully taxed with hundreds of millions of dollars in unconstitutional export HMTs. The importance of the legal and constitutional issues presented in this case is matched by the case's commercial and fiscal importance.

From the time the export HMT entered into force on April 1, 1987 until the time this Court held it unconstitutional in *United States Shoe*, the Customs Service collected about $1.435 billion in unconstitutional taxes from exporters. These monies were deposited into a Harbor Maintenance Trust Fund, and invested in securities for the benefit of the government. *See* 26 U.S.C. § 9505, 9602(b).

The lost time-value of exporters' money exceeds $700 million. This Court's decision concerning whether interest is payable on refunds of the export HMT will affect the

disposition of more than 4,000 lawsuits pending in the United States Court of International Trade. An additional 7,500 administrative claims pending with Customs, seeking refunds of the export HMT will also be affected by this Court's decision on the interest issue. The fiscal importance of the issue presented by the petition warrants the issuance of the writ of *certiorari*. *See United States v. Hill*, 506 U.S. 546 (1993).

Certiorari is also warranted by the unique nature of this case, and the constitutional context in which it arises. While Congress has provided for payment of interest on judgments awarding refunds of excess internal revenue taxes (28 U.S.C. § 2411), and on refunds of excess duties, taxes and fees collected under the customs laws (19 U.S.C. § 1505), the court of appeals' decision denies interest to taxpayers who were unconstitutionally assessed with the export HMT. The notion that Congress has waived sovereign immunity to permit the award of interest on virtually all tax refunds, yet retains such immunity when the tax is unconstitutional, is fundamentally flawed. The better view, as explained above, is that Congress has indeed waived sovereign immunity to not merely permit, but to *require* the payment of interest on refunds of unconstitutionally-collected export HMTs.

CONCLUSION

The petition for a writ of *certiorari* presents significant statutory and Constitutional issues. Given the legal and commercial significance of the issues presented, the writ of *certiorari* should issue.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR THE PETITIONER

The petition for certiorari demonstrated that the Federal Circuit's holding that the government need not refund *with interest* the more than $1.4 billion it unconstitutionally exacted from exporters is unfaithful to the letter and the spirit of this Court's prior decision in this case, *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998); Pet. App. 102a-110a (*U.S. Shoe I*), as well as to the statutory provisions enacted by Congress to implement the Harbor Maintenance Tax (HMT). Congress has long provided that those forced to pay taxes (28 U.S.C. 2411) or customs duties (19 U.S.C. 1505) in excess of their lawful obligations must be reimbursed with interest. The HMT, although denominated a "tax," relates to the passage of goods through the ports, prompting Congress to subject it to the administrative structure governing customs duties in Title 19. Although the customs laws are stated with import duties in mind, "that is hardly surprising in view of the Export Clause, which confines customs duties to imports." *U.S. Shoe I*, Pet. App. 106a. The government now joins the Federal Circuit in seizing on verbal anomalies that result from Congress's determination to apply to the HMT the customs provision providing for "[r]efund of duties * * * and interest" (19 U.S.C. 1505(b) (title)). This Court rejected the identical contention in *U.S. Shoe I* on the basis of Congress's explicit instruction to treat the HMT "as if [it] were a customs duty" (Pet. App. 106a (quoting 26 U.S.C. 4462(f)), and should do so again in this case.

Quite apart from Congress's evident intention that the United States not profit from the fruits of unlawful or excessive taxes and customs duties, the Export, Takings, and Due Process Clauses forbid the government's retention of the substantial profits it actually earned here. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980); *Fairbank* v. *United States*, 181 U.S. 283 (1901). The no-interest rule (see *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986)) is inapposite when the issue is the return of "income [that] has been actually received by the Treasury and is in its possession" (*Henkels* v. *Sutherland*, 271 U.S. 298 (1926)), at the very least when the government

obtains money through an exaction that is void *ab initio* and furthermore holds that income in a distinct fund such as the Harbor Maintenance Trust Fund (cf. *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring)). Characterizing the HMT as not excessive relative to the benefits conferred on exporters, the government and the court below conclude that interest is not owing because, under *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), a reasonable user fee is not a taking. The argument takes one's breath away. The HMT is not an excessive user fee because *it is not a user fee at all* but rather is void as an *unconstitutional tax on exports*. So this Court squarely held in *U.S. Shoe I*. This persistent unwillingness to give a full measure of effect to this Court's prior decision in this case alone merits review and reversal.

For these reasons, as well as those further detailed in the briefs *amici curiae*, certiorari should be granted.

I. The Solicitor General disputes neither that the questions presented are central to the administration of the customs laws nor that this Court's practice (exemplified by *U.S. Shoe I*) is to review "Federal Circuit decisions of significant fiscal importance." Pet. 12 (quoting Pet. for Cert. of the U.S., *U.S. Shoe I* 25). See *Amicus* Br. of HMT Steering Committee 14-18. The "[n]umerous cases" that this Court recognized were pending at the time of *U.S. Shoe I* (Pet. App. 105a) have since exploded to more than 10,000 administrative and judicial claims for more than $700 million in interest owing on refunds of the HMT. All of those claims are controlled by this single test case, as reflected by the several follow-on petitions, each of which seeks to be held pending the Court's disposition of this case. See No. 02-__, *IBM* v. *United States*; No. 02-1512, *Arbon Steel & Serv. Co.* v. *United States*; No. 02-1286, *Hohenberg Bros. Co.* v. *United States*.

II. The Solicitor General, like the Federal Circuit, is unable to articulate any *reason* Congress would have intended to deny exporters interest on an unconstitutional tax. The U.S. Code contains a raft of provisions governing refunds of both taxes and customs duties, under which "interest was affirmatively and separately contemplated by Congress." *Library of Congress* v.

Shaw, 478 U.S. 310, 315 (1986). See Pet. 13 (quoting 19 U.S.C. 1505; 26 U.S.C. 6611(a); 28 U.S.C. 2411, 2644). These waivers apply to refunds of every tax or duty analogous to the HMT, and furthermore (the government admits) to refunds to importers of overpayments of the *HMT itself.* See BIO 11 n.4 (citing regulation under which Customs refunds HMT to importers with interest). Indeed, on the government's view, apparently only an unconstitutional export tax escapes the congressional design. Because it would be both illogical and inconsistent with the hierarchy the Supremacy Clause establishes among sources of law for Congress to withhold interest solely because it is the *Constitution* rather than some *lesser* source of law that renders an exaction illegal, the Federal Circuit and the Solicitor General would attribute to Congress pure caprice, a conclusion that is as unjust as it is implausible.

In particular, the government suspends itself on the horns of a dilemma in arguing that interest is unavailable under *either* 28 U.S.C. 2411 (providing for interest on judicial refunds of tax overpayments) *or* 19 U.S.C. 1505 (providing for interest on customs duty refunds).[1] The Federal Circuit acknowledged that Section 2411 – providing for the award of interest on "any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax" – applies on its face to the Harbor Maintenance *Tax*. Pet. App. 123a. The court of appeals erred, however, in failing to recognize that Section 2411 addresses only the terms of court orders (compare 26 U.S.C. 6611 (governing refunds by the IRS)) and thus is not one of the statutes relating to the "administration and enforcement of internal revenue taxes" (26 U.S.C. 4462(f)(2)) that Congress intended to render inapplicable to the HMT. See Pet. 19. See generally *Amicus* Br. of Elliott Turbomachinery *et al.* In any event, as petitioner now shows, the principal argument of the Solicitor General in denying interest under Section 2411 – that

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[1] Contrary to the Solicitor General's assertion (BIO 8 n.2), the petitioner in the earlier *IBM* case relied on Section 2411, *not* Section 1505, and principally relied on constitutional arguments that it had not presented below. See U.S. BIO, No. 00-482, *IBM* v. *United States* 5.

Congress intended the HMT to be treated as a *customs duty* rather than a tax (see BIO 8 (citing Pet. App. 5a)) – only supports the conclusion that interest is available under Section 1505, which mandates the "refund of duties * * * and interest" (§ 1505(b) (title)). See generally *Amicus* Br. of Customs & Int'l Trade Bar Ass'n; *Amicus* Br. of ChevronTexaco *et al.*

a. The Solicitor General echoes the Federal Circuit's view that the HMT "does not fall within any portion of the text of [19 U.S.C. 1505(c)]," which by its terms "authorizes interest only in cases in which an 'importer of record' is seeking to recover a duty or other customs charge paid in connection with the 'liquidation or reliquidation' of an entry of goods into the United States." BIO 9. But petitioner, of course, is *not* arguing that the right to interest arises from Section 1505 standing alone. Rather, Congress provided in the HMT for the "[e]xtension of provisions of law applicable to customs dut[ies]." 26 U.S.C. 4462(f) (title). Rather than enacting wholesale a new body of law the sole function of which would be to administer the HMT as it applies to exports, Congress by reference expressly subjected the HMT to existing provisions governing import duties. The Solicitor General himself concedes, in attempting to distinguish Section 2411, that "Congress expressly elected to make the Harbor Maintenance Tax subject to the enforcement provisions of the customs laws" (BIO 8), yet the government and the Federal Circuit would undo that very choice.

Congress specifically directed that "*all* administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] * * * as if such tax were a customs duty." 26 U.S.C. 4462(f)(2) (emphasis added). The Solicitor General would simply read out of the statute the requirement that the HMT be subject to "all" of those customs laws, which plainly include Section 1505, a statute that is codified as an "[a]dministrative provision[]" of the customs laws (tit. 19, ch. 4 (title)). The government's opposition nowhere acknowledges the provision of Section 1505 that confers a right to interest, subsection (*b*), which requires the Customs Service to "refund any excess monies deposited, *together with interest thereon*, as determined on a liquidation or reliquidation."

Congress did not intend to condition exporters' right to a refund, with interest, on the formal act of "liquidation." See, *e.g.*, 19 U.S.C. 1504 (providing that, if no liquidation is performed, it is deemed to have occurred as a matter of law).

The fact that Section 1505 governs customs duties and therefore refers to imports and various acts relating to importation (see BIO 8) is immaterial. The government admits that duties are uniformly "imposed on *importers*—not on exporters—under the Harmonized Tariff Schedule of Title 19" (BIO 10 n.3) because the Constitution forbids *export* duties (Art. I, § 9, cl. 5). Customs "duties, by their very nature, provide for revenue from imports." *U.S. Shoe I*, Pet. App. 106a. Fully aware of that fact, Congress did not merely subject the HMT on *exports* to the existing "administrative and enforcement provisions of [the] customs laws" governing *imports*. Such a rule would have made Title 19 literally applicable, but functionally incomprehensible. Instead, Congress directed that those provisions, including Section 1505, be applied "*as if [the HMT] were a customs duty*" (26 U.S.C. 4462(f)(2) (emphasis added)) – *i.e.*, as if the HMT had all the characteristics of an import duty. Each phrase in Section 1505(c) on which the government relies – "importer of record," "entry," and "liquidation" – falls within Section 4462(f)(2)'s directive. The exporter of record (here, petitioner) is the obvious analogue to the "importer of record." An "entry" is the paperwork an importer submits in each instance "to secure the release of *imported* merchandise" (19 C.F.R. 141.0a(a) (emphasis added)), while a "liquidation," in turn, is "the final computation of the duties * * * accruing *on an entry*" (*id.* § 159.1) (emphasis added)). The analogue under the HMT to the "entry" and "liquidation" is the formal determination of the amount of HMT refund that Customs owes the exporter. At the very least, Section 4462(f)(2) requires the Customs Service to subject the HMT to the procedures governing import duties; this includes adopting procedures for exporters to submit an "entry" and to undergo "liquidation." The government's refusal to follow this statutory mandate cannot excuse its own failure to pay interest.

b. Nothing better illustrates that this petition presents the unfinished business of *U.S. Shoe I* than the government's failure even to *dispute* petitioner's showing that this Court previously rejected precisely the argument it now advances. See Pet. 16. Under 19 U.S.C. 1581(i), the Court of International Trade has exclusive jurisdiction over "any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * administration and enforcement" (§ 1581(i)(4)) of any statute "providing for [] revenue *from imports*" (§ 1581(i)(1) (emphasis added)). This Court held that Section 1581(i) nonetheless encompasses the application of the HMT to *exports*, relying on Section 4462(f)(*2*), which the Court described as "the *key directive*" (Pet. App. 105a (emphasis added)), and which (in language that directly parallels subsection (f)(*1*), *supra*) provides that "[f]or purposes of determining the jurisdiction of any court * * *, the tax * * * shall be treated as if such tax were a customs duty":

> True, § 1581(i) does not use the word "*exports*." But that is hardly surprising in view of the Export Clause, which confines customs duties to *imports*. Revenue from *imports* and revenue from *customs duties* are thus *synonymous in this setting*. In short, * * * Congress in § 4462(f)(2) directed that the HMT be treated as a customs duty for purposes of jurisdiction. Such *duties, by their very nature, provide for revenue from imports*, and are encompassed within § 1581(i)(1).

Pet. App. 106a (emphases added) (quotation marks and Court's brackets omitted). By parallel logic, Section 4462 subjects the HMT to the refund and interest provisions of Section 1505, notwithstanding its references to the characteristics of imports, on which the Federal Circuit and Solicitor General rely entirely. The total irreconcilability between the ruling below and this Court's unanimous decision in this very case is a further substantial ground for certiorari, and prompt reversal.

The Solicitor General furthermore flouts this Court's decision in *U.S. Shoe I* by arguing that the HMT is a reasonable "user fee" that "does not constitute *either* an internal revenue tax

or a duty, as those terms are ordinarily employed. * * * A fee for the use of government facilities is not a 'tax' or a 'duty' but is instead 'compensation' for services provided." BIO 10 n.3 (emphasis added) (quoting *U.S. Shoe I*, Pet. App. 109a). To be sure, Chief Judge Mayer made essentially that point in his opinion below denying interest when, citing his earlier solo *dissent* in *U.S. Shoe I*, he concluded that the HMT is a reasonable fee. Pet. App. 9a. But this Court unanimously disagreed with that dissenting view, and the language from *U.S. Shoe I* now quoted by the Solicitor General squarely *rejects* the very argument the government seeks to resuscitate. This Court in *U.S. Shoe I* recognized that *Pace* v. *Burgess*, 92 U.S. 372 (1876), sustained "a federal excise tax on tobacco" as "compensation given for services in fact rendered," rather than a forbidden export duty, because it "bore no proportion whatever to the quantity or value of the package" and "was not excessive" in light of those services. *U.S. Shoe I*, 523 U.S. at 369 (Court's brackets omitted). But the Court in *U.S. Shoe I rejected* the government's claim that the HMT falls within the "compensation" and "fee" rationale of *Pace*:

> Unlike the stamp charge in *Pace*, the HMT is determined entirely on an ad valorem basis. The value of the export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter. As the Federal Circuit noted, the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging. [¶] In sum, if we are "to guard against the imposition of a tax under the pretext of fixing a fee," *Pace* v. *Burgess*, 92 U.S., at 376, and resist erosion of the Court's decision in [*United States* v. *IBM*, 517 U.S. 843 (1996),] we must hold that the HMT violates the Export Clause as applied to exports.

Pet. App. 109a-110a (Court's alterations and citations omitted).

c. Nor does the Solicitor General have a coherent answer to petitioner's showing that the government's own practice

acknowledges that Section 1505 applies fully to the HMT. See Pet. 14-15. Section 1505 is the statutory authority not merely for the Customs Service to provide interest, but for it to *refund the principal*. See 19 U.S.C. 1505(b) ("The Customs Service shall * * * refund any excess monies deposited, together with interest thereon, as determined on a liquidation or reliquidation."). Indeed, the regulations providing for refunds explicitly cite Section 1505 as their statutory authority. See Pet. 14-15 & n.5. Petitioner's argument obviously is *not* that the authority of courts "to order refunds of harbor maintenance fees necessarily implies that courts also may award interest on such refunds." BIO 10. It is, rather, that Section 1505(b) "provides statutory authority for a refund, together with interest, in one breath; both stand or fall together." Pet. 14. The government's contention that Section 1505 is inapplicable, and thus that Customs is not required to refund *even the principal*, amounts to an assertion of the power to negate this Court's holding in *U.S. Shoe I* that the HMT is unconstitutional.[2]

III. Given exporters' obvious entitlement to interest under Section 1505, the Court clearly need not reach the constitutional issues raised by the second question presented. If the statutory text were less than clear, however, the mandate of the Export, Takings, and Due Process Clauses, alone or in combination, would require the government to pay interest on its refunds of the unconstitutionally exacted HMT, or at least to return to exporters the profits it actually earned. Contrary to this Court's emphatic determination in *U.S. Shoe I* that the Export Clause

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[2] The Customs Service has specifically acknowledged that Section 1505 *requires* it to pay exporters interest. See Pet. 18; Pet. App. 140a-143a. There is nothing "novel" (BIO 11 n.4) about recognizing the force of Customs' quite persuasive analysis, made (unlike the Solicitor General's brief) outside the context of litigation. Petitioner is relying not on "mere proposals" for regulations (contra *id.*), but on Customs' acknowledgement of the law's requirements. Compare *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (relying on Department of Justice's legal analysis set forth in notice of proposed rulemaking) with *Boeing Co.* v. *United States*, No. 01-1209, slip op. 15 n.13 (2003) (rejecting reliance on requirements of unadopted proposed regulations).

"*completely* den[ies] to Congress the power to tax exports *at all*" (Pet. App. 108a (emphases added)), the failure to award exporters interest on refunds of monies exacted in violation of that Clause would permit the government to gain value from export taxes and use them as a prohibited "source of revenue to the National Government" (*Fairbank* v. *United States*, 181 U.S. 283, 292-92 (1901)). The government relies on statements by this Court that the only constitutional violation requiring an award of interest is a Fifth Amendment "taking." Those statements, however, were *dicta*, and there is no persuasive textual or historical basis for denying the payment of interest for violations of the Export Clause's categorical prohibition while simultaneously mandating the award of interest as an element of the Fifth Amendment's more forgiving provision for "just compensation." Having never confronted the issue, the Court should decide it, and reject that anomalous reading of the Constitution, in this case. See generally *Amicus* Br. of Am. Ass'n of Exporters & Importers.

In addition, the Federal Circuit's decision conflicts with the principle under the Takings and Due Process Clauses that to the owners of the principal belong its fruits. See generally *Amicus* Br. of Air Prods. & Chems., Inc. (addressing Takings Clause and urging this Court to resolve related circuit conflict); *Amicus* Br. of Pearson Education *et al.* (addressing Due Process Clause). The Solicitor General misses the point of petitioner's argument – mischaracterizing the petition as claiming that the HMT was unconstitutionally "excessive" and chiding petitioner for supposedly failing to confront *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989). See BIO 14. Petitioner's argument under the Fifth Amendment is simply that "the government is required to refund the *significant profits that it actually earned* on unlawful exactions." Pet. 23 (emphasis in original). *Sperry*'s "excessiveness" inquiry does not enter into the picture, for *U.S. Shoe I* already established that (contrary to the government's argument) the HMT is not a reasonable "user fee" at all but rather an unconstitutional export tax. See *supra* at 5 n.3. It is thus the Solicitor General who fails to address the controlling precedent when he ignores the holding of *Webb's Fabulous*

Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980), that the government is required to return proceeds it earned on a distinct fund that (like the HMT exaction) lawfully belongs to a private party. Cf. *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring). The no-interest rule does not apply when the government is called on to return the "income [that] has been actually received by the Treasury and is in its possession." *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). See generally *Amicus* Br. of Federal Circuit Bar Ass'n (urging this Court to decide whether disgorgement of government's actually earned profits triggers the no-interest rule and to resolve circuit conflicts on that question).[3]

* * * * *

This case presents the Court with the opportunity to ensure fidelity both to its decision in *U.S. Shoe I* and also to the congressional design, thereby finally resolving the more than 10,000 claims under the HMT that are still pending and alleviating the serious injustice worked by the decision below. Certiorari should be granted.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

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[3] The statute in *Henkels* manifestly did *not* "provide[] for the recovery of interest along with principal." Contra BIO 16. The "net proceeds" described by the statute were nothing more than the value of the property *after its sale*. *Henkels*, 271 U.S. at 300. The Solicitor General also fails to acknowledge that *Henkels* expressly limited the earlier decision cited by the government (*United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251 (1888)) "to the precise facts of that case," concluding that "it *cannot* be accepted as a rule of general application." 271 U.S. at 302 (emphasis added). And the decision in *United States* v. *Louisiana*, 446 U.S. 253 (1980) (cited at BIO 16), had nothing to do with the return of profits earned by the government.

Respectfully submitted,

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